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SAFEGUARDING OUR NATION'S SECRETS: EXAMINING THE NATIONAL SECURITY WORKFORCE

HEARING

BEFORE THE

SUBCOMMITTEE ON THE EFFICIENCY AND EFFECTIVENESS OF FEDERAL PROGRAMS AND THE FEDERAL WORKFORCE

OF THE

COMMITTEE ON HOMELAND SECURITY AND GOVERNMENTAL AFFAIRS UNITED STATES SENATE

ONE HUNDRED THIRTEENTH CONGRESS

FIRST SESSION

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SAFEGUARDING OUR NATION'S SECRETS: EXAMINING THE NATIONAL SECURITY WORKFORCE

TUESDAY, NOVEMBER 20, 2013

U.S. SENATE,
SUBCOMMITTEE ON THE EFFICIENCY AND EFFECTIVENESS OF
FEDERAL PROGRAMS AND THE FEDERAL WORKFORCE,
OF THE COMMITTEE ON HOMELAND SECURITY
AND GOVERNMENTAL AFFAIRS,
Washington, DC.

The Subcommittee met, pursuant to notice, at 2:01 p.m., in room SD–342, Dirksen Senate Office Building, Hon. Jon Tester, Chairman of the Subcommittee, presiding.

Present: Senators Tester and Portman.

OPENING STATEMENT OF SENATOR TESTER

Senator TESTER. I will call to order this hearing of the Subcommittee on Efficiency and Effectiveness of Federal Programs and Federal Workforce. This afternoon's hearing is entitled, Safeguarding our Nation's Secrets: Examining the National Security Workforce.

I will say that Senator Portman is tied up. He is going to be here a little bit late and he is going to have to leave early, unfortunately. It is not because of the importance of this issue. It is because we have a Defense authorization bill on the floor and that is keeping a lot of the folks who wanted to be here today away. But we will do our best to get as much good information as we can on the record as we proceed through this so that they will have the ability to make good decisions with good information as those decisions arise.

From the significant disclosures of classified information to the tragedy at the Washington Naval Yard, it is abundantly clear to the American people that the Federal Government is failing to properly vet the individuals who are granted access to our Nation's most sensitive information and secure facilities.

And as we all see, there are real life consequences of these failures. In looking at the lessons learned, it is obvious that there is no single quick fix to such a broken system. It is about incomplete, falsified, and ultimately, background investigations and re-investigations. It is about agencies improperly adjudicating which employees and contractors should be granted a clearance, and it is about pure volume.

Today there are nearly five million individuals with a security clearance. You heard me right. Five million. And there are no indications that number will decrease any time soon. But it only takes one individual to slip through the cracks, one individual who could do untold damage to our national security by exposing sensitive information about government actions and programs.

One individual who, with no motive, with no warning, could kill 12 men and women in a secure government facility on a random Monday morning. Now, we have to get this right because there literally is no margin for error. This hearing will focus on the designation of positions in the Federal Government as sensitive to the national security, as well as the requirement for government personnel to have access to classified information.

Lacking appropriate guidance for such designations, Federal agencies are currently relying on a patchwork of Executive Orders (EO), Federal regulations, and an Office of Personnel Management (OPM) position designation tool that was not created to address security-related issues.

Meanwhile, OPM and the Office of Director of National Intelligence (ODNI) are finalizing a rule they claim will provide the update and guidance sought by the agencies and called for by the Government Accountability Office (GAO) and Members of this Committee.

But others, including some of the witnesses that are here today, have real concerns that the proposed guidance is inadequate and that it could have negative and substantial implications on taxpayers, national security, and Federal employee rights.

These concerns are compounded by this summer's Kaplan v. Conyers and Northover decision. This case involved two Federal employees who lost their jobs when their employing agency stripped them of their sensitive position status. Because the Conyers decision denied these employees their rights to due process through the Merit Systems Protection Board (MSPB), there is a real potential that tens of thousands of employees across the Federal Government have just lost their fundamental right to appeal a personnel decision, regardless of what drove that decision.

With this in mind, Senator Portman and our Ranking Member and I wrote a letter to ODNI and OPM in September regarding their proposed rule. In that letter we said, "From a fiscal and security perspective, far too many questions remain unanswered about the implications of this proposal, and due to the seriousness of the concerns we share, we urge you to defer finalizing this rule until the matter has been fully and publicly aired, and questions about its true scope, including the estimated cost and number of impacted Federal workers are answered." We are here today to get some of those answers.

Now I would like to introduce our witnesses, and Senator Portman has an opening statement. He can do that when he gets here. But I want to introduce my witnesses to the panel here today and we want to welcome them all. This truly is a great panel of witnesses, very knowledgeable and distinguished in your own right.

First we have Brian Prioletti, is Assistant Director of Special Security Directorate in the Office of the Director of National Intelligence. In that post, he is responsible for leading oversight and re-

form efforts of the security clearance process. Mr. Prioletti took the Assistant Director position this last May after more than three decades in the Central Intelligence Agency (CIA). He testified before the full Committee on security clearance issues last month, and I want to thank you for your service, Brian, and I want to thank you for joining us again today.

Tim Curry is the Deputy Associate Director for Partnership and Labor Relations in the Office of Personnel Management. He is responsible for OPM's efforts to design and promulgate government-wide programs for labor and employee relations. Prior to his current position, he served as the Executive Director of the Labor, Management, and Employees Relations at the Department of Defense (DOD). Tim, thank you for being here and getting through the traffic to be here.

Brenda Farrell is a Director for the Defense Capabilities Management Team in the Government Accounting Office, a post that she has held since 2007. She is responsible for GAO oversight of military and civilian personnel issues and has worked extensively on the personnel security clearance program. She testified before this Subcommittee in June about the lack of clearly defined policy and procedures needed to consistently determine whether a position requires a security clearance. It is good to have you back, Brenda, and as with the previous two, we look forward to your testimony.

David Borer is the General Counsel of The American Federation of Government Employees (AFGE). AFGE represents some 650,000 Federal employees, including tens of thousands who currently occupy positions deemed sensitive to national security. He is a veteran on labor relations issues and is here today to discuss the impact of the proposed OPM/ODNI rule and its impact on Federal employees. Welcome. We look forward to what you have to say, David.

Finally, Angela Canterbury. Angela is the Director of Public Policy for the Project on Government Oversight (POGO), where she has worked in that capacity since 2010. Founded in 1981, POGO is a non-partisan, independent watchdog that champions good government efforts. In particular, they have aggressively advocated for more appropriate balance between national security and Civil Service rights with similar protections and taxpayer accountability. Angela's work focuses on advancing policies that help stamp out corruption and promote government openness and accountability. She is here today to help us understand how the OPM/ODNI rule might impact transparency and whistle-blower rights. We welcome you, Angela, and I want to thank you and everybody else for being here today.

It is customary that we swear all witnesses in who appear before this Subcommittee. If you do not mind, I would ask you to stand and raise your right hand.

Do you swear the testimony you will give before this Subcommittee will be the truth, the whole truth, and nothing but the truth, so help you, God?

Mr. PRIOLETTI. I do.

Mr. CURRY. I do.

Ms. FARRELL. I do.

Mr. BORER. I do.

Ms. CANTERBURY. I do.

Senator TESTER. Let the record reflect that the witnesses answered in the affirmative.

With that, we will give each of you 5 minutes for your oral testimony. Know that your entire written testimony will be a part of the record. We will start with you, Brian. If you want to proceed, please do.

TESTIMONY OF BRIAN PRIOLETTI,[1] ASSISTANT DIRECTOR, SPECIAL SECURITY DIRECTORATE, NATIONAL COUNTERINTELLIGENCE EXECUTIVE, OFFICE OF THE DIRECTOR OF NATIONAL INTELLIGENCE

Mr. PRIOLETTI. Thank you, Senator. Chairman Tester, Ranking Member Portman, and distinguished Members of the Subcommittee, thank you for inviting me here today to discuss our proposed updates to the Federal Government's position designation system.

Recently, the ODNI and OPM jointly proposed changes to the existing regulations outlining the position designation process. These revisions, which include more detail than previous regulations, are geared to ensure that a consistent process is applied across the government for designating positions as sensitive or requiring a security clearance.

This foundational step helps ensure that individuals are investigated at a level appropriate to the risks inherent to the position they hold, thereby mitigating risks to national security interests. Our proposed rule for the designation of national security positions was published in the Federal Register for a 30-day public comment in May 2013 with comments due in June. We are in the process of reviewing those comments and working to finalize the proposed regulations by February 2014.

The events of September 11, 2001, drove a dramatic increase in the number of positions requiring a security clearance, a trend which has continued in recent years. Our office reported this year that about 4.9 million Federal Government and contractor employees either hold or have been determined to be eligible to hold security clearances. The potential risk to national security and costs associated with this volume of cleared individuals underscore the need for executive branch agencies to have a uniform and consistent process to accurately designate the sensitivity of a position based on the position duties and the potential impact to national security, and ensure that the individuals holding these positions are appropriately investigated and adjudicated commensurate with that risk.

The concern with position designation is not a recent phenomenon. Civilian positions within the Federal Government have been designated as sensitive based on the duties and responsibilities for over 60 years, when Executive Order 10450 first established the requirement for the Federal employment process to consider national security interests, and charged the heads of Federal departments and agencies to establish effective programs to ensure

[1] The prepared statement of Mr. Prioletti appears in the Appendix on page 29.

that employee hiring and retention is clearly consistent with the interests of national security. EO–10450 requires a position to be designated as sensitive if the occupant of that position could, by virtue of the nature of position, bring about a material adverse effect on national security. EO–12968, which was issued in 1995, establishes a uniform Federal personnel security program for individuals to have access to classified information which only may be granted on the basis of a demonstrated foreseeable need for that access. EO–12968 also makes agency heads responsible for establishing and maintaining an effective program to ensure that eligibility for access to classified information is clearly consistent with the interests of national security.

The existing designation system requires revision to align with other recently updated aspects of the clearance reform effort, such as the revised Federal Investigative Standards (FIS) signed in December 2012, and to ensure a common understanding by Federal agencies as to how to designate positions and ensure accurate and consistent position designation across the U.S. Government.

Under EO–13467, the DNI, as Security Executive Agent, and the Director of OPM, as the Suitability Executive Agent, both have related roles to ensure that a uniform system for position designation related to each, to their respective populations of authority.

The proposed regulation is not intended to increase or decrease the total number of national security-sensitive positions within the Federal Government; but, rather, to ensure that each position is designated accurately. The intent is to issue national-level policy guidance to promote consistency in designating positions and address changed national security concerns post-9/11. This approach will improve consistency and the level of investigation performed for similar positions in other agencies; thereby, promoting efficiency and facilitating reciprocity. Additionally, the proposed regulations align with the GAO recommendations in its July report entitled, Security Clearances: Agencies Need a Clearly Defined Policy for Determining Civilian Position Requirements. In that report, the GAO noted the need for standardized and clearly defined policy for agencies to designate positions as sensitive, or requiring a security clearance and for the existing position designation tool to be updated to include such guidance. The proposed regulations also incorporate the GAO's recommendation that the executive branch agencies periodically review and validate or revise designations of existing positions. This guidance is expected to have positive implications for both national security and the Federal workforce.

The proposed rule and revised position designation tool will provide executive branch agencies with consistent guidance and a concrete process to accurately reassess the sensitivity level assigned to the current positions, and ensure future positions are designated accurately and consistently.

The proposed rule will help guide agency heads in designating a position as sensitive with respect to national security, even if the position does not require access to classified information. The enhanced guidance will facilitate more uniform designations across agencies, which are better aligned with the actual national security implications and sensitivities inherent with the position. This process is expected, in some cases, to result in a re-designation of posi-

tions to a lower sensitivity level or public trust designation, thereby reducing costs associated with investigations and adjudications required for the higher clearance levels. Conversely, there may be instances in which a sensitivity designation of a position increases, therefore requiring more extensive background investigation, depending upon that we designate its sensitivity level. If that happens, the workforce can be assured that the change is necessary, and based upon the measured execution of the updated guidance deemed necessary to protect national security interests. The new regulations are intended to clarify the position designation requirements and provide additional details over the previous regulations in order to ensure that positions are accurately designated in a manner that appropriately mitigates the risk.

The Federal workforce will benefit from accurately designated positions and that employees will not be required to complete extensive background application paperwork or undergo investigations for positions that do not warrant it. Further, a consistent designation and investigative approach promotes clearance reciprocity, and therefore, personnel mobility between positions of equivalent position designation or between agencies.

It is imperative that we develop a sound position sensitivity designation process because the sensitivity level of a position determines the complexity and cost of the investigation conducted on the individual selected to occupy its position. ODNI will continue to work with OPM and other executive branch agencies to ensure that position designation policy and procedures include requirements for agencies to conduct periodic reviews to validate the accuracy of the existing position designations.

Thank you at this time for the opportunity to testify and this concludes my statement.

Senator TESTER. Thank you, Brian. Tim, you are up next.

TESTIMONY OF TIM F. CURRY,[1] DEPUTY ASSOCIATE DIRECTOR FOR PARTNERSHIP AND LABOR RELATIONS, OFFICE OF PERSONNEL MANAGEMENT

Mr. CURRY. Thank you, Senator. Mr. Chairman, Ranking Member Portman, and Members of the Subcommittee. Thank you for the invitation to testify on behalf of the Office of Personnel Management on regulations affecting the designation of positions in the Federal Government as national security-sensitive, as well as the *Kaplan v. Conyers* case.

The obligation to designate national security positions is not a new authority. It is outlined in an Executive Order which was published in 1953. Additionally, the Code of Federal Regulations (CFR) presently requires each agency to follow established procedures to identify national security positions.

In this vein, OPM and the Office of Director of National International, jointly proposed regulations in May of this year regarding the designation of national security positions in the competitive service. Similar regulations have been in effect for over 20 years. The proposed rule is one of a number of initiatives OPM and ODNI have undertaken to simplify and streamline the system of Federal

[1] The prepared statement of Mr. Curry appears in the Appendix on page 35.

Government investigative and adjudicative processes to make them more efficient and equitable. OPM originally proposed amendments on this issue in December 2010, with a publication to the Federal Register. Those proposed amendments were later withdrawn and reissued in May 2013 by OPM and ODNI jointly, pursuant to a Presidential Memorandum directing OPM and ODNI to issue amended regulations. The Presidential Memorandum recognizes responsibility both agencies possess with respect to the relevant rulemaking authority. The current proposed rule simply reissues the 2010 proposal under joint authority with technical modifications and clarifications, and provides the public an opportunity to submit additional comments.

The purpose of the proposed rule, both as originally published and as republished, is to clarify the requirements and procedures agencies should observe when designating as national security positions, positions in the competitive service, positions in the excepted service where the incumbent can be non-competitively converted to the competitive service, and Senior Executive Service (SES) positions filled by career appointment.

The proposed rule is not intended to increase or decrease the number of positions designated as national security-sensitive, but is intended to provide more specific guidance to agencies in order to enhance the efficiency, accuracy, and consistency with which agencies make position designations. The older regulations provide only general guidance. The newer proposed regulations are intended to clarify the requirements and procedures agencies should follow when designating national security positions by providing more detail and concrete examples.

In addition, the newer proposed regulations will help agencies correctly determine the specific level of sensitivity for a position that is determined to affect national security, which in turn will help determine the type of background investigation that will be required.

Finally, the proposed rule addresses periodic reinvestigations in order to better coordinate the reinvestigation requirements for national security positions with requirements already in place for security clearances. This will help ensure that the same reinvestigations can be used for multiple purposes and prevent costly duplication of effort.

The proposed rule was published in the Federal Register on May 28, 2013, with a comment period that closed 30 days later. OPM and ODNI are presently reviewing comments from members of the public.

This Subcommittee also invited OPM to testify on a separate topic, the *Kaplan v. Conyers* case. As you know, the U.S. Court of Appeals for the Federal Circuit, in a 7–3 decision, held that the Merit Systems Protection Board, lacks jurisdiction to review the merits of executive branch risk determinations regarding eligibility to hold national security sensitive positions.

Conyers examined whether the MSPB, in reviewing an appeal of an adverse personnel action against an employee, may review the merits of the Department of Defense's predictive judgment of national security risk. On appeal of the MSPB decision, the Federal Circuit concluded that the MSPB can review whether DOD's action

is procedurally correct, but cannot review whether DOD correctly exercised its predictive judgment of national security risk. The Federal Circuit held that Congress did not give the MSPB this authority. The Federal Circuit based its decision on long-standing precedent, specifically the Supreme Court's 1988 decision in *Department of the Navy v. Egan,* that the MSPB, in reviewing an appeal of an adverse action cannot review the merits of an agency decision to deny an employee security clearance. The Federal Circuit held that Egan controlled all such national security determinations, not just those related to access to classified information.

Thank you again for the opportunity to testify and I look forward to answering any questions you may have.

Senator TESTER. Thank you, Tim. Brenda, you may proceed.

TESTIMONY OF BRENDA S. FARRELL,[1] DIRECTOR, DEFENSE CAPABILITIES AND MANAGEMENT, GOVERNMENT ACCOUNTABILITY OFFICE

Ms. FARRELL. Chairman Tester, thank you for the opportunity to be here today to discuss the requirements for personnel to have access to classified information. As you know, my testimony on the governmentwide security clearance process before your Subcommittee this past June included a discussion of our work on the steps that agencies use to first determine whether a Federal civilian position requires access to classified information. Today, I am here to elaborate on that process and report on the extent of progress by the agencies in implementing our recommendations and actions still needed.

Over the years, GAO has conducted a broad body of work on security clearance issues that gives us a unique historical perspective. My remarks today are based primarily on our July 2012 report on defining policy and guidance for national security positions. My main message today is that actions are still needed to help ensure that a sound requirements process is in place to determine whether a position requires a security clearance for access to classified information.

My written statement is divided into two parts. The first addresses guidance to determine if a civilian position requires a security clearance. In July 2012, we reported that the DNI, as Security Executive Agent, had not provided agencies clearly defined policy and procedures to consistently determine if a position requires a clearance. Absent such guidance, agencies are using an OPM tool to determine the sensitivity and risk levels of positions, which in turn informed the type of investigation needed.

The sensitivity level is based on the potential of an occupant of a position to bring about a material, adverse affect on national security. OPM audits, however, found inconsistencies among agencies using this tool to determine the proper sensitivity level.

For example, in an April 2012 audit, OPM assessed the sensitivity level of 39 positions and its designations differ from the agency in 26 of them. In our July 2012 report, we recommended that the DNI, in coordination with OPM, issue clearly defined policy

[1] The prepared statement of Ms. Farrell appears in the Appendix on page 39.

and procedures for Federal agencies to follow when first determining if a position requires a clearance.

ODNI concurred with our recommendation and has moved forward with actions to address it. We found that in January of this year, the President authorized the DNI and OPM to jointly address revisions to the Federal regulations that are intended to provide guidance for the designation of national security positions. We believe that the proposed regulation is a good step toward meeting the intent of our recommendation. However, implementation guidance still needs to be developed and the proposed regulation recognizes that point.

The second part of my statement addresses the guidance in place to periodically reassess civilian positions that require security clearance. We also reported in July 2012 that the DNI had not established such guidelines requiring agencies to review existing positions.

Without such a requirement, agencies may be hiring or budgeting for initial and periodic personnel security clearance investigations using position descriptions and security clearance requirements that do not reflect current national security needs.

Further, since such reviews are not done consistently, agencies cannot have assurances that they are keeping the number of positions that require clearances to a minimum, as required by Executive Order 12968. Moreover, conducting background investigations is costly. We found the Federal Government spent over $1 billion to conduct background investigations in fiscal year (FY) 2011.

We recommended in July 2012 that the DNI, in coordination with OPM, issuance guidance to require agencies to periodically reassess the designation of all Federal civilian positions. ODNI and OPM concurred with this recommendation. The proposed regulations do not appear to require a periodic reassessment, as we have recommended. We still believe that this needs to be done.

For more than a decade, GAO has emphasized the need to build and monitor quality throughout the personnel security clearance process to promote oversight and positive outcomes such as maximizing the likelihood that individuals who are security risks will be scrutinized more closely, the first step to ensure that a sound process is in place to determine whether or not positions need access to classified information.

We will continue to monitor the outcome of the final Federal regulation, as well as other agency actions to address our remaining recommendations. Mr. Chairman, this concludes my remarks. I will be happy to take questions when you are ready.

Senator TESTER. Well, thank you, Brenda. I appreciate your comments. David, you may proceed.

TESTIMONY OF DAVID A. BORER,[1] GENERAL COUNSEL, AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES

Mr. BORER. Mr. Chairman, Senator Portman, and Members of the Subcommittee. On behalf of AFGE and the more than 650,000 Federal employees we represent, including tens of thousands who occupy positions designated as sensitive, I thank you for the opportunity to testify today.

AFGE has grave concerns about the recent decision issued by the U.S. Court of Appeals for the Federal Circuit in *Kaplan v. Conyers*, and about the proposed rules on the designation of positions as national security sensitive issued jointly by OPM and ODNI.

The Conyers decision and the proposed regulations strike at the heart of the merit system, which for decades has been the foundation in the Federal Civil Service. Conyers eliminated the right to a meaningful hearing before the U.S. Merit Systems Protection Board. The proposed regulations exacerbate this problem by allowing agencies to pick and choose which employees will have the right to due process before the MSPB. Conyers and the proposed regulations are only the latest injustices inflicted upon Federal workers.

Thanks to a 3-year pay freeze, sequestration in which over half of the Federal employees lost 30 percent of their take-home pay for 6 weeks, and a 16-day furlough with the shutdown, many were left unsure of how or when they would be able to pay their bills. Some untold number fell into debt or fell deeper into debt. That additional debt now potentially exposes thousands of Federal employees to unfair removal from so-called sensitive positions without so much as a hearing before the MSPB.

To be clear, Conyers does not pertain to individuals with security clearances. It is not a case about classified information. The individuals in that litigation, Rhonda Conyers and Devon Northover, were an accounting technician and a grocery story clerk, respectively. Both lost their eligibility because of a modest amount of delinquent debt due to circumstances beyond their control. They were penalized because of their credit scores, and worse, they had to face the loss of their jobs.

This is deeply troubling to AFGE and it should be a real concern for this Committee. The implication that financial hardship equates to disloyalty, even for employees with no access to classified information, is unsupported and offensive. In fact, AFGE has found that the practice of penalizing employees based on their credit scores has had a disproportionate impact on employees, over 40 female employees, and employees of color.

Conyers is an ill-founded extension of an earlier case involving security clearances. In 1988, the Supreme Court decided the *Department of Navy v. Egan,* holding that the MSPB could not review the merits of a security clearance determination in the course of adjudicating an adverse action.

Later, in Conyers and Northover, the MSPB held that in the absence of a security clearance, Egan did not apply. In its Conyers' decision, the Federal Circuit opened the door to arbitrary and unchecked Executive agency action. The Conyers' ruling rejected the

[1] The prepared statement of Mr. Borer appears in the Appendix on page 60.

text, the structure, and the history of the Civil Service Reform Act (CSRA), along with the plain language of Egan to hold that the MSPB may not review the merits of an agency determination that an employee is ineligible to hold a sensitive position.

The proposed regulations provide no real oversight for agency position designation determinations. By contrast to the rule proposed by OPM in 2010, these new rules fail to direct the agencies that in order to designate a national security position, they must make an affirmative determination that the occupant of that position could cause a material, adverse effect on national security through neglect, action, or inaction.

In both Conyers and the proposed regulations are allowed to stand, executive branch agencies will have the unreviewable power to deprive hundreds of thousands of employees the protections that Congress gave them in the CSRA. That, Senators, is likely to be an irresistible invitation to abuse.

To counter this loss of due process rights, Delegate Eleanor Holmes Norton introduced H.R. 3278 to clarify that workers or applicants are entitled to be heard by the MSPB even if it implicates a sensitive position determination. AFGE strongly urges introduction of a companion bill in the Senate with the same bipartisan support shown in the House.

AFGE also looks forward to working with the Members of this Committee to restore fairness and common sense to the due process protections and other rights that have historically protected the Federal workforce. This concludes my statement and I would be happy to respond to any questions.

Senator TESTER. Thank you for your statement, David. Angela.

TESTIMONY OF ANGELA CANTERBURY,[1] DIRECTOR OF PUBLIC POLICY, PROJECT ON GOVERNMENT OVERSIGHT

Ms. CANTERBURY. Chairman Tester and Ranking Member Portman, thank you very much for your oversight of the national security workforce and for inviting me to testify here today. I am speaking on behalf of POGO, but also on behalf of the Make it Safe Coalition which represents more than 50 groups and millions of Americans very concerned with whistleblower protections in both the public and the private sector.

We are deeply concerned that the national security claims here and throughout the government really threaten to engulf our government and, with cruel irony, will make us less safe. In August of this year, this Court decision in Conyers stripped Federal employees in national security sensitive positions of their right to an appeal an adverse action, setting the stage to also strip due process rights for actions that are discriminatory or in retaliation for whistle blowing.

This deeply flawed decision in *Kaplan v. Conyers* armed agencies with sweeping power that affects untold numbers of civil servants, untold because OPM cannot say exactly how many position holders there are. The definition under the Executive Order 10450 for personnel who may have material adverse affect on national security must have objective, credible boundaries.

[1] The prepared statement of Ms. Canterbury appears in the Appendix on page 66.

Yet, in Conyers, the government did not provide adequate boundaries or justifications for national security sensitive designations. Indeed, Rhonda Conyers was an accounting technician and David R. Northover was a commissary stocker, and neither had any real credible national security role.

While there is a need for additional screening for a very limited number of civilian positions with specific national security responsibilities but no access to classified information, extensive background checks should never be a predicate for denying due process rights. Quite the opposite.

Congress gave the Civil Service and whistleblower protections to this critical workforce to foster accountability for waste, fraud, and abuse. These workers had, for years, been able to challenge adverse personnel actions at the Merit Systems Protection Board, but not anymore.

Now if an agency fires a national security sensitive employee for having made a legally protected whistleblower disclosure, or because of that employee's race or religion, the employee likely will not be able to seek justice. It is just a matter of time, as was noted from the bench in oral arguments in Conyers after the Egan decision removed due process rights for security clearance actions, it was inevitable that the Board would do the same for whistleblower retaliation as it did in Hesse v. Department of State.

Because Conyers is so broad, it flouts the congressional intent of the Civil Service Reform Act, as well as the Whistleblower Protection Act, and the recently passed and strongly bipartisan Whistleblower Protection Enhancement Act, reforms that we worked for years to enact.

Of course, even before Conyers, there was a jaw dropping lack of oversight of these seemingly arbitrary and overused designations. At the direction of the President, OPM and DNI issued a joint proposed rule to clarify the proper use. We agree, it is about time, but unfortunately, it does nothing to assure us that the Obama Administration plans to curb the practically unlimited discretion afforded to agencies, improved, efficient oversight, or protect critical rights for whistleblowers and Civil Service.

In fact, the proposed rule is poised to expand the use of these designations to overly broad categories of positions such as senior managers and undefined key programs and fact finding positions. Before a final rule, far more needs to be known about the scope and cost, policy impacts, due process protections, and oversight of these designations.

We would welcome a directive from the President clarifying access to the MSPB and for OPM and DNI to curb the expansive use of these designations and conduct proper oversight. However, we believe that ultimately Congress must re assert the rights it previously provided. We urge you to advance an easy legislative fix. Simply clarify that an employee appealing an action arising from an eligibility determination for a position that does not require a security clearance may not be denied MSPB review. This is the Delegate Holmes Norton legislation that was mentioned.

We also urge you to consider the broader context of the growing national security State. In the wake of the Snowden disclosures, we caution you to guard against over reactions. Excessive secrecy un-

dermines our democracy and threatens our national security by making it harder for us to protect our legitimate secrets.

The evidence for the growing national security State is disturbing. As you mentioned, Chairman, we have almost five million security clearance holders. Approximately 20 million four-drawer filing cabinets could be filled with the amount of classified data accumulated every 18 months by just one international agency, according to the GAO.

It is time for Congress to be far less deferential to the executive branch on claims of national security. You can begin by reining in the nearly unbridled power of agencies to misuse national security labels and make whole swaths of our government hidden and accountable. We must be able to hear from whistle-blowers.

Thank you again for inviting me to testify today and I look forward to your questions.

Senator TESTER. Well, thank you for your testimony, Angela, and I thank all of you for your testimony. We will get to the questions right now. Some of this is going to be repetition from what some of the panelists said, but this is for anybody who wants to answer it.

In terms of the Conyers decision, we are talking about two Federal employees without a security clearance or any need for access to classified information. One was an accounting technician. I assume that is similar to a Certified Public Accountant (CPA) maybe, or not even at that level?

Mr. BORER. Lower level accounting.

Senator TESTER. Lower level accounting for the Defense Department, in that position for 20 years. One was a clerk in a commissary, which indicates to me he probably ran a cash register. Is that fairly accurate?

Mr. BORER. He was a grocery store clerk, essentially, yes. He ran a cash register.

Senator TESTER. And stocked shelves?

Mr. BORER. Stocked shelves.

Senator TESTER. And because of delinquent debts brought about by a divorce of one and a death in the family of another, they were stripped of their ability to hold a government position designated as sensitive to national security. The designation is consistently and arbitrarily applied to positions across government as Angela just got done saying.

They were subsequently stripped of their rights to appeal these personnel decisions of the Merit Service Protection Board, a basic right of Federal employees. There are so many questions to be asked about this. I will just start with the basic one and that is, can somebody explain to me how these actions were carried out in the best interest of our national security? Do you want to jump in on that one? No? OK.

So just let me ask you this. You have a position that is designated as sensitivity, and then you have a person in that position that does not have any level of security clearance. Correct so far? And yet, that person is fired because they have accrued some debt beyond their control. And that is deemed as being OK? That is the first question. No? Anybody want to talk about that? Do you want to tell me why that is OK?

Mr. CURRY. Senator, as you may know, AFGE has filed an appeal to the Supreme Court related to these issues and I may be limited on what I can say about the case because the Justice Department represents the executive branch on that.

Senator TESTER. Sure.

Mr. CURRY. But I guess the point I would make on this is, one, that under Executive Order 10450, positions could have national security impact whether they have access to classified information or not. And the reason that we have—OPM went forward on challenging the MSPB's decision on this is the Director of OPM has authority, under the law, when it believes that MSPB has rendered an erroneous decision, which is—an erroneous interpretation of Civil Service law, rule, or regulation.

Senator TESTER. OK.

Mr. CURRY. And so, when the Director sought reconsideration from MSPB on this, the intent was to preserve the executive branch's authority to make risk determinations regarding national security positions.

Senator TESTER. I got it. So, I mean, let me put it on one hand. I get it where if you have somebody that has a high security clearance and they owe somebody some money, that could possibly compromise what is going on. These guys did not have a security clearance at all. They were working in sensitive positions, but they did not have a security clearance.

And it escapes me, it totally escapes me, and we are going to get further down, because, I mean, you have to start here to get down into the real problems of this. It escapes me how a grocery store clerk could be put at the same level as somebody that is dealing in the Department of Defense with really sensitive information, or in the CIA with really sensitive information that owes somebody some money.

I honest to God do not get it. First of all, I do not get how you can have a person working in a position that is deemed as sensitive and not have a security clearance. I do not get that at all. And second, if they do not have the security clearance, I do not understand why they can be fired for that reason and not have any appeal rights. Fired because they basically accrued debt.

Am I on a different level here? Does this make sense to you guys?

Mr. PRIOLETTI. Senator, I am not in a position to determine what level you are on, but I can say to you——

Senator TESTER. I will take that as a compliment.

Mr. PRIOLETTI [continuing]. It was meant as a compliment, sir. In this particular case, it is difficult for us to speak on behalf of DOD, but as you mentioned, there are two points here. One, in fact, they were in what were deemed at that time sensitive positions.

Senator TESTER. But they did not have a personal clearance. They had not been vetted.

Mr. PRIOLETTI. There is a difference between the sensitive position and having a clearance, as we know, and the reason that the position was considered sensitive is not based upon whether they were going to have access to classified information. It was whether the position could cause any type of adverse impact to national se-

curity. And in this particular case, if you have access to a food supply, you could, in fact, have an adverse affect to national security, if that food supply, in this particular case, is DOD.

Senator TESTER. Would you think the folks down in the Dirksen Service Southern Buffet are in sensitive positions? They have access to food. I eat, as you can tell, more regularly than I should there.

Mr. PRIOLETTI. Again, sir, I would not comment on that last statement, for sure. The designations are done by the individual organizations and I would leave that to the appropriate organization to determine.

Senator TESTER. OK. So let us get back to where you are going, and that is, you are laying down—ODNI and OPM are laying down in concert, laying down some regulations that agencies can follow, right? Once those regulations are laid down, will you be able to tell me whether the folks down in the server will be designated as sensitive positions?

Mr. PRIOLETTI. Once the regulation is enacted, sir, it will provide you much clearer guidance so that we have uniform consistency across the determination factors, so that when you are making a determination on a particular position, the guidelines and the standards by which the position will be judged against will be consistent across the U.S. Government.

Senator TESTER. So regardless if you are working in the Food and Drug Administration (FDA) or the Small Business Administration (SBA), the same guidelines will apply, correct?

Mr. PRIOLETTI. Well, sir, the CFR 1400 applies to the competitive service. But the idea is to apply that eventually across the U.S. Government for consistency.

Senator TESTER. Just to get your point, I mean, once you get the regulations down, they will apply across State—every Federal agency equally, correct?

Mr. PRIOLETTI. Yes, sir.

Senator TESTER. OK. So who is going to make sure that the agency actually utilizes—and I do not want to pick on you, Brian. Tim, you can answer, too. Who is going to make sure that the agency actually utilizes the rules that you promulgate?

Mr. CURRY. Senator, I echo Brian's remarks. The idea here is, the current rules at 5 CFR Part 732, they provide some very general guidelines, where the proposed rule is providing concrete examples, more detail.

Senator TESTER. Got you.

Mr. CURRY. And so, the goal here is to allow for more precision in making a position sensitivity designation. So OPM and ODNI both have oversight roles that they can assess how agencies are implementing these rules. We expect to also develop implementing guidance and also update the position designation tool which will also provide for more consistency across the government.

Senator TESTER. Got you.

Mr. CURRY. And what we are trying to minimize is under designation of positions where it might impact national security and minimize over designation of positions which might increase costs.

Senator TESTER. OK. Where is the oversight of the agencies to use the rules that you are putting down? Is it voluntary or is some-

body—where is the oversight coming from? That is the question. The question is, you can put down the rules and if they decide not to use them, you do not have rules, you do not have consistency, you are not going to achieve the goals that I think you want to achieve. So the question is, who has oversight?

Mr. PRIOLETTI. Sir, oversight is a dual role in this case. Both OPM from the suitability side and ODNI from the security exec side.

Senator TESTER. So you are going to be—I mean, pick an agency. Department of Justice (DOJ), CIA, DOD. You are going to be providing oversight to see that they use those rules?

Mr. PRIOLETTI. Yes, sir. That would be our responsibility.

Senator TESTER. And so, we have how many sensitive positions do we have? I have to be quiet here. I will come back. Senator Portman.

Senator PORTMAN. Thank you, Chairman. You will give them time to think about that question.

Senator TESTER. Exactly.

OPENING STATEMENT OF SENATOR PORTMAN

Senator PORTMAN. Well, first, thanks for holding the hearing. This is, as you all know, maybe our second hearing we have held. There has also been a hearing at the full Committee level on this same issue. I think we have acknowledged there is a need for significant reform with regard to the security clearance process.

This is not our last hearing, so we will continue to work on this. We appreciate your being here and giving us some input. Sorry I was a little late. This is kind of a crazy time right now with the budget conference I am on and so on. But I am pleased we have made a little progress, even in the last couple of months.

We have a legislation that Senator Tester and I introduced that actually passed called the SCORE Act, and it gives some important oversight responsibilities on this to the Inspector General (IG) at OPM, Mr. Curry, as I think you are familiar with. We are actually working on additional legislation now that we think will also be able to be moved pretty quickly because this is bipartisan and I think it makes the system more accountable and more efficient.

On the Defense Authorization Bill, which is on the floor this week, we have an amendment that asks GAO to examine quality metrics and reciprocity as it pertains to the process. And along those same lines, we asked OMB's Performance Accountability Council (PAC) to examine how we can improve the processes for access to State and local law enforcement records in the background investigation process.

That came out of the tragic incident at the Navy Yard with Aaron Alexis. Some of you may have followed that. That came up in one of our hearings. That again, better access to State and local law enforcement records would have been very helpful in that investigation, in the background investigation for him, and it would be a way to shortcut some of these investigations.

Today, as we have heard, we are focusing more broadly on the question of who should have access to information, how much information should be classified, how can we more efficiently and effectively again go through the clearance process. I have appreciated

your testimony. I have had a chance to hear from some of you and look at some of your other testimony.

I am going to focus in on over classification because I think that is one of our issues here. Ultimately, we are not going to be able to keep up with the clearance process if we continue to classify so much information. And so, I think we need to get back to the root of the problem. And then if we have time, I will also ask some more questions along the lines the Chairman was asking.

But on over classification or on classification, not to have a bias here, we have had, in our Committee hearings, and in the full Committee hearing, this consistent theme come up that there is more information being classified. It is a concern, one, because it is hard for people we represent, our constituents, to have access to this information to understand how the government works and how it is conducting itself.

And two, if everything is classified, sort of nothing is classified, in my view. I mean, to the extent you are not being careful about what you prioritize, it is tough to protect information that really is of national security importance.

I think, not making that information available to the public might be one reason the national security sector sometimes is interested in classifying, even when it might not have a national security implication. So this Public Interest Declassification Board (PIDB), which was established by Congress back in 2000, has said that a single intelligence agency classifies one petabyte of data every 18 months. That is the equivalent of 20 million filing cabinets filled with text, or approximately 13 years of high-definition video.

So that is a single intelligence agency classifying that much every year-and-a-half. And so, I guess volume should not be the only indication, the only metric we use, but that certainly seems like a lot of information that, frankly, is very tough to keep up with.

So starting with this notion of how much should we be keeping under lock and key, I have a couple questions. And by the way, the cost of this is growing, too. From 2001 to 2011, that 10-year period, until a couple years ago, the cost went from $4.7 billion to $13.6 billion a year. So now, $13.6—$13.4—$13.36 billion a year in simply costs associated with storing this vast amount of information.

And by the way, that does not include the over $1 billion needed every year just to clear the personnel authorized to have contact with this information, or to work with this material.

So maybe starting with ODNI, Mr. Prioletti, appreciate your being here today because I think you probably have the most expertise on the national security side to be able to talk about this. Do you think we are classifying too much, too little, and talk a little bit about what goes into the decisionmaking process for information to be labeled classified or sensitive?

Mr. PRIOLETTI. Thank you, Senator. I think what we do is classify what we feel is necessary at the time. I do not believe I am in a position to say whether we over classify or not. The volume that you mentioned is epic, but there are guidelines that are set specifically to determine what information needs to be classified

and that set of guidelines are used to determine what information goes under a classification or a non-classification status.

I think we are using those as judicially as possible. The pace of business and the emerging threats environment that we are working in necessitates that we look at information on a daily basis and make that determination using those guidelines that I referred to.

Senator PORTMAN. And these new tools that we are talking about, the new regulations and so on, is for determining whether somebody has a position that should be designated as sensitive. But you have also got tools that you are using to try to determine whether something is classified or not.

And do you believe that the kind of tools that you have available to you are appropriate to make those decisions?

Mr. PRIOLETTI. Yes, sir, I believe they are appropriate, but they are evolutionary in nature and change to meet the changing environment in which we work in.

Senator PORTMAN. So here is one of the other data points we have from this PIDB, which is charged with looking at, how much classified information we have and whether it is growing or not. They are the ones that have indicated that it is growing so dramatically from $4.7 billion to protect it, roughly 12 years ago, to over $11 billion today.

But they say that it would take two millions employees 1 year to review even one petabyte of information. And as I have indicated, one petabyte of data is now being collected every 18 months by a single intelligence agency. So two millions employees 1 year to review it. So obviously we do not have the workforce to review that information. Is that a concern?

Mr. PRIOLETTI. Sir, if you mean is there a concern over the numbers that you just listed, or the lack of personnel to do——

Senator PORTMAN. Well, I mean, it is not practical. I am sure you guys would like a bigger budget, but there is not going to be two million employees to review even this one petabyte we talked about. I guess, just give me a sense of whether ODNI is tackling this issue of declassification and trying to ensure that we have the classification of materials, but do not over classify.

And if not, how can this be justified? We are not going to have the employees to be able to review that. It will not be useful information. So what is ODNI's latest effort on declassification?

Mr. PRIOLETTI. Well, sir, what we do is we provide that oversight and that guidance to the organizations, and as I referred to the standards earlier before in one of your earlier questions, that particular guidance is Executive Order 13526, which lays out the standards for classifying information, and basically that information is tied to two areas.

It is tied to potential damage to national security in the event of an unauthorized disclosure, and what that damage would be to national security. And that is the overriding guidance that is provided to organizations. EO–13526 is looked at on a periodic basis to see if there is any need for change. And that is how we continue to provide oversight to the organizations.

Senator PORTMAN. OK. Let me take you off the hot seat for a minute and go to Brenda Farrell, if she would comment on it, from a sort of oversight perspective, more general perspective. Do you

think it is a problem of over classification, and if so, do you think ODNI and others are doing the right things to try to de-classify information so it is more useful?

Ms. FARRELL. GAO, as noted earlier, has looked at the area of what is in place for classified material, but it has been several years. We have just initiated work in this area and I would be more than happy to have that team come and explain the scope of that work to you or your staff if you would like.

Senator PORTMAN. And is GAO doing a specific research project on this issue of classification?

Ms. FARRELL. Yes.

Senator PORTMAN. That would be terrific if you could provide the Subcommittee with that and that may be the subject of a future hearing.

Ms. Canterbury, you talked about it earlier. You mentioned, as I recall, that you think that the legislative branch provides too much deference to the executive branch on classification. Can you tell us why you think that and what you think ought to be done?

Ms. CANTERBURY. Well, I think it is on a range of issues. I think classification is one of them. I think the national security claim is being used in more and more contexts now, and it sounds to me like the executive branch itself is not conducting proper oversight. And I thank you very much for this hearing because this is such a—and the previous hearings that you have had in this area because I think it has been long overdue.

So now, all of this congressional attention in this space, hopefully, will spur some action and create some internal controls that are really lacking.

Senator PORTMAN. Thank you. My time is over. I appreciate you all being here today. And again, this is just another hearing in our attempt to try to get at this issue, not just of over classification of material, but also on the security clearance process and how do you make it more efficient and more effective to avoid the problems we saw at the Navy Yard. So thank you, Mr. Chairman.

Senator TESTER. Thank you, Senator Portman. I appreciate your work on this issue. I know you are busy. Appreciate your being here while you can. So thank you.

I am going to go back to where I left off, and that was, we were talking about sensitive positions. We were talking about security clearances for people, both those issues. This is for anybody and if more than one of you want to answer, you can. How many sensitive positions have been designated?

Mr. CURRY. Senator, it is difficult to estimate the number of sensitive positions across the government, but I would note that the number of sensitive positions does not necessarily equate to the number of security clearances, because not only our regulations are dealing with competitive service employees. We also have excepted service in the Federal Government. And, of course, security clearances apply to excepted service employees as well as contractors.

Senator TESTER. I got it.

Mr. CURRY. It is difficult to estimate that right now.

Senator TESTER. David.

Mr. BORER. Mr. Chairman, yes, it is impossible probably to estimate, but under the proposed regulations, virtually anybody in the

Department of Defense could be designated as holding a sensitive position. So we are talking about hundreds of thousands of employees who are being potentially denied MSPB rights.

Now, let me illuminate something based on what you said earlier, that the Conyers and the regulations are so insidious for two more reasons we have not discussed today. One is that Conyers and Northover were both serving in their positions for years before their position was suddenly re-designated as a sensitive position.

And with that re-designation, they were suddenly scrutinized for their credit ratings and, summarily brought before the agency and action was taken that was later deemed unreviewable. So that is one thing which fine public servants, long service, no problem at all, it is invisible to the government what their credit looks like, who cares, and suddenly with this stroke of a pen, they are hauled into this process.

Second, because it is unreviewable, we have not even been told to this day what it was about Mr. Northover's or Ms. Conyers' positions that merited this kind of treatment. The government, at some point in the Northover case, mumbled something to the effect that, Well, he might be able to tell how many sunglasses we were ordering. I fail to see, as I am sure the Chairman does, how that is a security risk to the Nation, unless we are rolling out an amphibious assault on the city of Seattle where the sun never shines.

Senator TESTER. Go ahead, Brenda.

Ms. FARRELL. Mr. Chairman, our work that we conducted in 2011 and 2012 found that there was a lack of guidance to help determine the sensitivity. The current 732 was in place, but it was very broad. And, of course, in our work at DOD and DHS, we repeatedly had officials tell us that the definition was so broad that it could capture just about any Federal position.

So the steps that have been taken to put some parameters around that is much needed. It is not to say that by itself, that Federal regulation can answer the mail, but it is a start.

Senator TESTER. You are talking about the one that was initially put on the books, or are you talking about the one that was presented in May 2010?

Ms. FARRELL. May 2010, which does repeat quite a bit of what was previously put on the books. The difference is, some of the problems that we discovered in 2011 and 2012 was that the ODNI had not taken an active involvement with OPM in this particular area, and that was due to their evolving roles, that they both received their respective designations which was ODNI as Security Executive Agent, and OPM as the Suitability Agent in 2008.

So there was a period when they have been determining exactly how their roles would interrelate.

Senator TESTER. OK. And I may not have the month right, but I think it was May 2010. Is that right? Or is it December 2010?

Mr. CURRY. I can. Senator, the original regulation was proposed in December 2010.

Senator TESTER. OK. Good enough.

Mr. CURRY. And I would like to clarify a point——

Senator TESTER. Go ahead.

Mr. CURRY [continuing]. With regard to every position in DOD being designated as sensitive. As we noted in the explanation in

the supplemental of that proposed rule in December 2010, each position designation is going to be based on a review of each individual position based on their duties and nature of their work, not a broad class of the employees across an agency based on their mission.

Senator TESTER. Mr. Borer can speak for himself, but I am not sure that he said that. I think what he said was if you could take each position and designate it, you could literally designate the whole DOD.

Let me get to the rule of 2010, which—and I do not want to put words in your mouth, Brenda—you said was not adequate. Am I correct?

Ms. FARRELL. Well, it did not have the involvement of ODNI and the DNI is the Security Executive Agent responsible for making sure there is uniform policy, and now the current proposed regulation does acknowledge the DNI's role.

Senator TESTER. So ODNI is involved now?

Ms. FARRELL. Yes.

Senator TESTER. Does that make the rule—have you seen the rule, the February 14th, the rule that they were going to get put in stone? Have you seen that rule?

Ms. FARRELL. The current proposed regulation?

Senator TESTER. Yes.

Ms. FARRELL. Yes. And it does——

Senator TESTER. Is that adequate?

Ms. FARRELL. By itself, no. And the rule does note that implementation guidelines are the responsibility of ODNI with OPM——

Senator TESTER. Right.

Ms. FARRELL [continuing]. And that is definitely what will be needed to make sure that there is the oversight you are talking about, and quality controls in place for the agencies to implement it.

Senator TESTER. But ultimately in the end, is it giving the agencies the kind of guidance they need to develop some uniformity? Does it give them the metrics to both determine which positions need to be designated as sensitive? And I assume it deals with security clearances, too?

Ms. FARRELL. It provides more detail. Some of it is very similar to the old rule in terms of the definition of national security positions.

Senator TESTER. Was the old rule adequate as far as that goes?

Ms. FARRELL. Apparently not based on the work that we conducted in 2011 and 2012 because it was so broad the agencies had difficulty interpreting it.

Senator TESTER. So where are we heading here? Are we heading here back to the same spot? I mean, the new rule is very similar to the old rule and the old rule was not adequate?

Ms. FARRELL. Well, the new rule does expand on the definition of national security positions. It includes some of the key positions that were named, but then it tweaks it and it expands much more so.

Senator TESTER. Still not adequate?

Ms. FARRELL. I do not know. I do not know because——

Senator TESTER. I thought you said there were studies that were done in 2010 and 2011 that said it was not adequate.

Ms. FARRELL. When we did our review that we issued last year, we found that the guidance not adequate to help the agencies determine the suitability of positions.

Senator TESTER. OK.

Ms. FARRELL. The 2010 proposed rule was never implemented.

Senator TESTER. OK. David, you had something else?

Mr. BORER. Yes, Mr. Chairman. The new rule, the new version of the rules that were published in 2010 omit key provisions that talk about what the agencies have to do in order to designate a position as a national security position.

The 2010 rule would have required an affirmative determination that the occupant could cause a material, adverse effect on national security. That has been deleted. So there is no direction, and certainly it will be easier for the agencies if they do not have to make that hurdle.

Senator TESTER. OK.

Mr. BORER. As you talk about oversight, for our money, the oversight that is required here is MSPB review on the back end.

Senator TESTER. Yes. Tim, you want to talk about that for a second? Why was that deleted?

Mr. CURRY. Yes. Senator, OPM and ODNI, by these regulations and by our implementing guidance, will provide detail on uniformity and consistency across the government. But under the Executive Order 10450, each agency has had responsibility to make the position designation.

So what we are trying to do is assist them in exercising their authority by trying to ensure uniformity across the government.

Senator TESTER. So why would material, adverse effect be taken out of the rule?

Mr. CURRY. No, sir, that is a requirement of the Executive Order. This rule is implementing that Executive Order.

Senator TESTER. OK. Getting back to the part about different agencies, and you are right, the head makes that call. Are they bound by anything other than just their respect for you to utilize the rules that you put forth?

Mr. CURRY. Well——

Senator TESTER. The agencies, yes.

Mr. CURRY. For purposes of consistency, yes, they will apply these rules, but they ultimately make the designation themselves.

Senator TESTER. Just to be clear, and this is not picking on anybody here. To be clear, the agencies can determine whether to use or whether to go their own way when it comes to those designations?

Mr. CURRY. No, sir.

Senator TESTER. They have to use your rules?

Mr. CURRY. They have to use our rules, but they make the ultimate final decision when applying these rules.

Senator TESTER. OK.

Mr. CURRY. And, Senator, just for clarification, when they are applying these rules, they are in the best position to look at the positions in their agencies, the nature of those duties of that position,

and determine the adverse impact on national security if there is action, inaction, or neglect to duty by the person in that job.

Senator TESTER. OK.

Mr. BORER. Mr. Chairman.

Senator TESTER. Yes, sir.

Mr. BORER. Just so there is no misconception on the part of the Committee about the consistency and the integrity of this process, I would point out that in Ms. Conyers' case, Northover's agency reversed itself and cited, expressly cited, the pending litigation as the reason why they were going to drop the re-designation of her position.

And in Mr. Northover's case, he was later restored to this position as a result of an unrelated Equal Employment Opportunity (EEO) claim and has since been promoted. So we can talk about consistency and about applying rules and so forth. The reality is on a ground level at these agencies, it does not happen. These managers are manipulating the process.

Senator TESTER. I hear you. Look, what I want to get to is I want to make sure that—and I think that Angela brought this up in her opening statement—cost oversight, due process, all those things need to be handled. And I am an open government guy. I think the more transparent government is, the better government works.

I also understand that there are people who want to do a lot of harm to this country, so we have to make sure that the folks that really do have access to sensitive information are properly vetted. Why we do not know how many sensitive positions are classified within government is disturbing to me, and maybe I should not feel that way, but I do.

I think that if we have agencies out there that are arbitrarily—and I know that was part of the goal for the rule, is to get rid of the arbitrary nature of designations, but if they can still do that and the only person that knows that without a doubt are you guys, probably everybody at the table, as a matter of fact.

But if they can arbitrarily do what they want as far as determining which positions are sensitive, because they can find something out there that would do that—I mean, the example of food was a fine example because we all eat—why—I guess the question is, are we going to end up with another Snowden incident or another Naval Yard shooter incident, because we have so many of these things to do that folks end up cutting corners in the process?

I do not mean to verbalize too much about this. Angela brought it up. I mean, the fact is, we have a situation where we have so many people out here with security clearances that corners are being cut now to get those clearances done.

And a person could deny that, but the proof is in the pudding and look what happened with Alexis. So I guess oversight by the legislative branch is something that I think we ought to take back a lot of the power that we have to make three equal branches of government and hearings like this help.

Any other suggestions that you might have, Angela, as far as what we could do here to make sure that the rules that ODNI and OPM are putting in place actually do what I think you guys want them to do; and yet, does not break the bank, protects due process of workers, and, go ahead.

Ms. CANTERBURY. Thank you very much, Chairman. First and most importantly, Congress is going to have to fix the law and make sure that these civil servants and whistleblowers have access to review at the Merit Systems Protection Board. That is an absolute first must.

Second, these positions need to be better understood and categorized before a proposed rule, before a finalized rule. It should have been done before the proposed rule, in our estimation. I might suggest a process similar to that with the analogous information.

We had all of these strange, secret markings that proliferated. Right? And the agencies were just marking things for official use only, secret but unclassified, and so, the Obama Administration put together a process to try to rein that in and have some rationale for information that is not classified, but is controlled but unclassified.

And so, an inventory took place. I might recommend something along those lines for these positions. If we really want to get a handle on legitimate designations, then tell us what those are. I mean, I am a little confused like you. Like, if there is not a security clearance, then what are the legitimate designations for national security? Tell us, agencies, and then base a rule upon that designation.

Senator TESTER. You are saying tell us what the metrics are for determining the position?

Ms. CANTERBURY. Yes, absolutely, and which positions you are using now, and have a really good, thorough look at whether or not those can be streamlined into very narrow, very specific concrete categories so that the agencies do not have wiggle room.

Then you need to have some oversight over that process. OPM has not been doing its job. They were given responsibility by President Eisenhower in Executive Order 10450 and they are supposed to be overseeing how the agencies designate these.

I mean, what we have heard today is they are just letting them do whatever, and after this rule, they also will be completely deferential to the heads of these agencies. They have no plans to go back and check whether or not their rule will be applied properly.

Senator TESTER. OK. I will let you respond to that, Tim.

Mr. CURRY. Well, as I noted earlier, OPM and ODNI do have the joint oversight rule with regard to these rules and there will be oversight and assessment of how the agencies are applying these rules. So I would respectfully disagree with that.

Senator TESTER. OK. And excuse me for not knowing this answer. Are there metrics within the rule?

Mr. CURRY. OK. I am consulting with my advisor.

Senator TESTER. That is perfectly all right. I do the same thing.

Mr. CURRY. There are reporting requirements, so based on the reporting requirements, we can learn information on how they are implementing this, but there is no specific metrics.

Senator TESTER. So if there are not metrics in the rule, do you have metrics to know that they are implementing the rule in a way that it is intended?

Mr. CURRY. OK, sir. Just what we are proposing in the rule is to comply with process efficiency requirements. Additional data may be collected from agencies conducting investigations or taking action under this part. These collections will be identified in sepa-

rate OPM guidance issued as necessary under 5 CFR 732.103, which is our current regulations which deal with national security positions.

So there is an opportunity for us that we would collect additional data.

Senator TESTER. OK. So do you feel confident that what you have done with the rule and your ability to collect additional data and you have the manpower to be able to ensure that security clearances are given to those who only absolutely need them?

Mr. CURRY. Well, I would note that this rule is unrelated to security clearances. It is only related to position sensitivity designation, so I would have to defer to Mr. Prioletti on security clearances.

Senator TESTER. That is fine. Apply it to the designation of the position.

Mr. CURRY. Well, in addition to the rules and the implementing guidance and the updates to the position designation tool, those are tools that are going to help the agencies in making those designations being consistent. There will be training that is offered by our Federal Investigative Services and that training will be updated for agencies to, again, assist agencies when they are making those determinations.

Senator TESTER. So putting that in Montana talk, do you have the ability then to make sure that the positions that are classified are positions that necessarily need to be classified?

Mr. CURRY. Sir, I cannot answer that question right now. I think as we are developing implementing guidance, those are kind of——

Senator TESTER. Is that a goal the Department—I do not want to——

Mr. CURRY. We certainly, as part of our oversight responsibilities, would want to ensure that the proper designations are being made.

Senator TESTER. OK. Brian, do you want to speak about the security clearance angle for the same group of questions as far as making sure that the folks who absolutely need them get them and folks who do not, do not?

Mr. PRIOLETTI. Right. I agree with what Mr. Curry had mentioned. The CFR 1400 that we were originally talking about here was, in fact, the position designation tool, not a security clearance tool.

And if I may speak to what Angela mentioned earlier, asking for more detail, that is exactly what the proposed rule would do. It would provide more detail to the organizations in terms of guidance on how to determine those designations of the positions. And we believe that this rule will get us a lot farther than we were in the past.

This is not new, sir. As we mentioned in our testimony, all of us mentioned, designation of positions has been going on since 1953 and it is an evolutionary process, and I think we continue to build and make a better product to address those issues.

Senator TESTER. Got you. I want to talk about security clearances for people, though. OK? That is part of the other part of this, because we have five million of them, 1.4 million top secret. Is there anything being done in that realm to make sure that the peo-

ple who need them have them and the folks that do not need them do not have them?

I do not know about you, but five million seems like a heck of a lot of folks to have a security clearance, and 1.4 million top secret security clearances seems like a pile. That is more than live in the State in Montana by about 40 percent. Can you give me an idea on, if there is any metrics or any advice, any guidance that is being to agencies on that?

Mr. PRIOLETTI. Sir, we have existing guidance under 12968 and 13467 Executive Orders.

Senator TESTER. How old are those rules?

Mr. PRIOLETTI. 12968 was amended in 1995 and 13467 came out in 2008, so they are not quite as old as 10450.

Senator TESTER. Right.

Mr. PRIOLETTI. And those are the guidelines that are given to all organizations to determine clearance-granting for individuals. It includes your adjudicative guidelines, it includes your investigative guidelines, and those are what are used by all organizations to make a determination if a security clearance is required for an individual or not.

Senator TESTER. In your opinion, is that adequate? Are we making sure that security clearances are going to those who absolutely need that access to that information to be able to do their jobs?

Mr. PRIOLETTI. Yes, sir, I believe they are, because they are continually reviewed and revisited to ensure that they are meeting today's environment in which we work.

Senator TESTER. Brenda, I want to get back to the rules and codification of them. Do you think there is a worth in codifying the guidance, the updated guidance along with quality controls, periodic reviews, guidance beyond the 24 months proposed in the rule? Do you think codification is a good thing in this case or do you think it is not necessary?

Ms. FARRELL. What we do see missing is the periodic reassessments. There will be a one-time assessment that the agencies would be required to conduct within 2 years after the rule is finalized. But periodic reviews are still a missing piece. We still do not know what the implementation guidelines will provide—which I agree, which should be developed after the rule. But the implementation guidelines will be critical in order to understand what the oversight will be and what the quality controls will be used for oversight.

The rule, the proposed rule is an improvement over the current rule. The current rule, again, is so broad it is subject to interpretation across the board. The proposed rule does provide more information to help the agencies. But again, by itself and without proper oversight, it is still unknown whether this will increase the number of clearances, decrease the number of clearances, or whether there will be some other issues, as some of the panel members have raised.

Senator TESTER. OK. Well, I think we will wrap this up. I want to thank everybody for being a part of the hearing. Look, I will just say this. If we are going to—hopefully, we all have the same goals and I think they were goals that set out that I think Angela put forth in her opening statement, and if she did not do maybe some-

body else did that dealt with cost and due process and oversight and all that stuff, over classification.

If those are not the goals, then somebody has to tell me what the goals are, because those ought to be the goals. I think the only way we are going to get to a position where, No. 1, this does not break the bank and that we can do a good job really classifying the positions that need to be classified, is we really laser in and give these agencies some directive and have oversight to make sure that they are following your directives.

I am not sure that is going to happen, but I can tell you that if it does not happen, these kind of sessions are not going to stop; they are going to continue. These Committee hearings and asking folks to be accountable for what is going on are going to continue.

So I would just say that if there are ideas, either from the private sector, non-profit sector, from the union groups or from the agencies, that we can help you with to be able to help you do your job to make sure that we are able to achieve what we are trying to get here with truly having positions that are designated sensitive that need to be designated sensitive, and not because it is convenient to designate them as sensitive for some other reason.

Or the same thing with security clearances, making sure that the folks who have them need them and they are not just handed out like candy at Halloween. I think it is really going to be important. And so, I will offer, as Chairman of this Committee, and I know Senator Portman will do his level best, too, to make sure that we fix what I think is a very serious problem that I talked about in my opening remarks.

I would just say that this will only get fixed if we work together, and I mean between branches on this and with the private sector.

So I just want to thank you all for being here. This afternoon I am going to be introducing legislation, the Clearance Accountability and Reform Enhancement Act, along with Ranking Member Portman, McCaskill, and Johnson and others to bring more accountability the security clearance process. Hopefully that will help you do your job.

A key part of this legislation will require an updated guidance to agencies, along with quality controls, from you folks, OPM and ODNI, who will require periodic reviews and guidance to ensure it is regularly updated to reflect our current requirements.

I would argue, in fact, that there is a lack of clear guidance that has led us down a path where we now have five millions folks with security clearances and access to our Nation's most sensitive information and facilities. Would you like to speak about that, Brian? Go ahead.

Mr. PRIOLETTI. Sir, if I may?

Senator TESTER. Sure.

Mr. PRIOLETTI. And I do not mean to interrupt.

Senator TESTER. No.

Mr. PRIOLETTI. I just wanted to clarify, we are very sensitive to what you say about that number, and the five million number that you are referring to covers both people with security clearances as well as people eligible for access. And being sensitive to that number, as you mentioned, five million of anything is a lot.

Senator TESTER. That is.

Mr. PRIOLETTI. And because of that, recently, and speak of the devil, as you mentioned, on Halloween, the DNI signed an Executive Correspondence going out to all the government agencies stating that they are required to go through their clearance lists, validate the numbers, come back with the people who are being debriefed from their clearances, and get back with us with that information.

Senator TESTER. When will they get back to you with that information?

Mr. PRIOLETTI. They were given 90 days, sir.

Senator TESTER. And you did it on Halloween, OK. Well, my next question would be, if there are five million that either have clearances or are eligible, how many have clearances? And you will have that in about, what, 75 days or so? OK. That is good. Right?

Mr. PRIOLETTI. Yes, sir.

Senator TESTER. Would love to have that as soon as you get it.

Anyway, I look forward to working with the folks that are on this panel today and I want to express my appreciation for you being here. I think it was a worthwhile discussion about where we are and, potentially, where we are going. And I look forward to working with my colleagues on this Subcommittee and throughout the Senate to get legislation on this done.

I am confident that in a time of hyper-partisanship that we can act responsibly and put the partisanship aside and buildupon the passage of the SCORE Act and take further steps to improve the security clearance process for the security of this country.

And so, with that, I will say this record will remain open for 15 days for any additional comments or questions that might want to be submitted. Once again, thanks to the panel for being here. This Committee meeting is adjourned.

[Whereupon, at 3:29 p.m., the hearing was adjourned.]

APPENDIX

Statement for the Record

before the

SUBCOMMITTEE ON THE EFFICIENCY AND EFFECTIVENESS OF FEDERAL PROGRAMS AND THE FEDERAL WORKFORCE

UNITED STATES SENATE

on

"SAFEGUARDING OUR NATION'S SECRETS: EXAMINING THE NATIONAL SECURITY WORKFORCE"

Mr. Brian Prioletti

Office of the National Counterintelligence Executive

Office of the Director of National Intelligence

November 20, 2013

Mr. Chairman, Ranking Member Portman, and distinguished members of the Subcommittee, thank you for the invitation to testify today on behalf of the Office of the Director of National Security (ODNI) regarding the designation of national security sensitive positions across the Federal government.

In May, the ODNI and Office of Personnel Management (OPM) jointly proposed regulations to improve the position designation process within the Federal government and our ability to ensure that individuals are appropriately investigated to protect our national security interests. The Proposed Rule for the Designation of National Security Positions in the Competitive Service and Related Matters ("the Proposed Rule") was published in the Federal Register (78 FR 31847 on May 28, 2013) for 30-day public comment. ODNI and OPM are reviewing the comments to finalize, with Executive Branch coordination, the proposed rule language.

The events of September 11, 2001 drove a dramatic increase in the number of positions requiring a security clearance – a trend which has continued in recent years. The ODNI reported that as of October 1, 2012, over 4.9 million Federal government civilian workforce, military personnel, and contractor employees held or were determined eligible for access to classified information or to hold a sensitive position within the Federal government. The potential risks to national security and significant monetary costs associated with this volume of personnel holding clearances underscore the need for executive branch agencies to have a uniform and consistent process to determine which positions are sensitive or require eligibility for access to classified information.

The concern with position designation is not a recent phenomenon. Civilian positions within the Federal government have been designated as sensitive based on their duties and

responsibilities for over 60 years. In 1953, Executive Order (EO) 10450 established the basis for our current investigative process and identified the heads of departments or agencies as responsible for establishing and maintaining effective programs to ensure that civilian employment and retention in employment is clearly consistent with the interests of national security. This order assigns responsibility to agency heads for designating positions within their respective agencies as sensitive if the occupant of that position could, by virtue of the nature of position, bring about a material adverse effect on national security. Executive Order 12968, issued in 1995, makes agency heads responsible for establishing and maintaining an effective program to ensure that eligibility for access to classified information is clearly consistent with the interests of national security and states that eligibility for access to classified information shall only be requested and granted on the basis of a demonstrated, foreseeable need for access.

I. Justification for the Rule

Although agency heads retain the flexibility to make position designation determinations, the existing processes used to make those determinations must be updated and standardized, as have other aspects of the clearance process under the Joint Suitability and Clearance Reform Effort. Pursuant to EO 13467, the DNI, as Security Executive Agent, and the Director of OPM, as Suitability Executive Agent, both have related roles to ensure a uniform system for position designation related to each of their respective areas of authority. In the February 2010 *Security and Suitability Process Reform Strategic Framework,* a key reform deliverable identified for enhancing reciprocity was the consistent implementation of overarching policy guidance such as "position designation guidance that assists agencies in selecting the appropriate investigative level for their position." A step in achieving this goal is the joint ODNI and OPM revision of 5 Code of Federal Regulations Part 732, redesignated as Part 1400, through the Proposed Rule.

The Proposed Rule is not intended to increase the number of national security sensitive positions within the Federal government. The goals of the Proposed Rule are to issue national level policy guidance to promote consistency in designating positions as national security sensitive that reflect current national security needs, which in turn will lead to consistency in the level of investigation performed for similar positions in other agencies. Ideally this will promote efficiency and facilitate reciprocity. Additionally, this rule aligns with the recommendations of the Government Accountability Office's (GAO) report entitled, *Security Clearances: Agencies Need Clearly Defined Policy for Determining Civilian Position Requirements* (GAO-12-800), dated July 2012, to issue standardized and clearly defined policy and procedures for agencies to follow in determining whether Federal civilian positions require a security clearance; revise the existing position designation tool; and issue guidance to require executive branch agencies to periodically review and revise or validate the designation of their existing Federal civilian positions.

II. Implications For the Federal Workforce and National Security

Determining the requirements of a Federal civilian position includes assessing both the risk and sensitivity level associated with a position, which includes consideration of whether that position requires eligibility to access classified information or could potentially cause damage to national security. The process addresses the position duties and responsibilities, unique mission requirements, whether the position requires eligibility for access to classified information and, if so, the level of access. The designated sensitivity level of the position then drives the type of background investigation required, with positions of greater sensitivity level requiring a more extensive background investigation. The process requires careful analysis to avoid

"overdesignation," which has cost implications; or "underdesignation" which leads to security risks.

The Proposed Rule and revised position designation tool will provide Executive Branch agencies with consistent guidance and a process to accurately re-assess the sensitivity level assigned to current positions and ensure future positions are designated consistently. This guidance is expected to have positive results for both the Federal workforce and national security. The Proposed Rule will help agencies understand the scope of their discretion in designating a position as sensitive with respect to national security even if the position does not require access to classified information. The enhanced guidance will facilitate more uniform and consistent designations which are more closely aligned with the actual national security implications and sensitivities attending the position. This process is expected, in some agencies, to result in the re-designation of positions to lesser sensitivity levels or public trust designations. This will reduce instances of "overdesignation," and produce savings in costs associated with investigations and adjudications required for higher clearance levels. Conversely, there may be instances in which an evaluation results in the change of a sensitivity designation of a position to a level which requires a higher level of investigation. The new regulations are intended to clarify the position designation requirements and provide additional detail over the previous regulations in order to ensure that positions are accurately designated in a manner that appropriately mitigates the risk to national security.

III. Conclusion

It is imperative to develop a sound position sensitivity designation process because the sensitivity level determines the complexity, and cost, of the investigation conducted on the individual selected to occupy the position. ODNI will work with OPM and other executive

branch agencies to ensure that position designation policy and procedures include requirements for agencies to conduct periodic reviews of position designations to ensure sufficient investigative coverage to meet the higher or lower risks associated with each position and validate the accuracy of those designations of all Federal civilian positions. Greater uniformity in agency position sensitivity designations will advance security clearance reform by establishing consistent standards, promoting greater reciprocity, more closely aligning investigative costs with associated risk, and reducing insider threats.

This concludes my statement for the record. Thank you for the opportunity to testify on this important step in clearance reform.

UNITED STATES OFFICE OF PERSONNEL MANAGEMENT

STATEMENT OF
TIMOTHY F. CURRY
DEPUTY ASSOCIATE DIRECTOR
PARTNERSHIP AND LABOR RELATIONS
U.S. OFFICE OF PERSONNEL MANAGEMENT

before the

SUBCOMMITTEE ON THE EFFICIENCY AND EFFECTIVENESS OF FEDERAL PROGRAMS AND THE FEDERAL WORKFORCE

UNITED STATES SENATE

on

"SAFEGUARDING OUR NATION'S SECRETS: EXAMINING THE NATIONAL SECURITY WORKFORCE"

November 20, 2013

Mr. Chairman, Ranking Member Portman, and members of the Subcommittee, thank you for the invitation to testify on behalf of the Office of Personnel Management (OPM) on regulations affecting the designation of positions in the Federal government as national security sensitive, as well as the *Kaplan v. Conyers* case.

Proposed Regulation

The obligation to designate national security positions is not a new authority. It is outlined in Executive Order 10450, *Security Requirements for Government Employment*, which was published in 1953. Additionally, Title 5 of the Code of Federal Regulations, Part 732, National Security Positions, requires each agency to follow established procedures to identify national security positions.

OPM and the Office of the Director of National Intelligence (ODNI) jointly proposed regulations in May of this year regarding the designation of national security positions in the competitive service. Similar regulations have been in effect for over twenty years. The proposed rule is one of a number of initiatives OPM and ODNI have undertaken to simplify and streamline the system of Federal Government investigative and adjudicative processes to make them more

efficient and equitable. OPM originally issued proposed amendments on part 732 on December 14, 2010, with a publication to the Federal Register, when efforts to revise government regulations regarding the designation of national security positions first began. The December 2010 effort came after OPM engaged in extensive consultation with the Office of Management and Budget, the Department of Defense (DoD), and ODNI. The proposed rule updated OPM's longstanding regulations setting standards for designating positions in the competitive service as national security sensitive, which it had issued under the authority of various statutes and Executive Orders.

These proposed amendments were later withdrawn and reissued in May 2013 by OPM and ODNI jointly, pursuant to a January 25, 2013 Presidential Memorandum directing OPM and ODNI to jointly issue amended regulations "with such modifications as are necessary to permit their joint publication." The Presidential Memorandum recognizes the responsibility both agencies possess with respect to the relevant rulemaking authority. Specifically, in 2008, pursuant to Executive Order 13467, the Director of National Intelligence was given new responsibilities as Security Executive Agent involving, among other items, the establishment of investigative and adjudicative standards for eligibility for access to classified information and developing guidelines and instructions on the processes used for eligibility determinations. The joint reissuance recognizes the agencies' complementary missions regarding the positions covered by the rule.

The proposed rule therefore simply reissues the 2010 proposal under joint authority, with technical modifications and clarifications, and provides the public an opportunity to submit additional comments. The purpose of the proposed rule, both as originally published and as republished, is to clarify the requirements and procedures agencies should observe when designating, as national security positions, positions in the competitive service; positions in the excepted service where the incumbent can be noncompetitively converted to the competitive service; and Senior Executive Service positions filled by career appointment.

The proposed rule maintains the current standard under Executive Order 10450, which defines a national security position as "any position in a department or agency, the occupant of which could bring about, by virtue of the nature of the position, a material adverse effect on the national security." The purpose of the revision is to clarify the categories of positions in which, by virtue of position duties, the occupant could have a material adverse effect on the national security, whether or not the positions require access to classified information. The proposed rule would also clarify complementary requirements for reviewing positions for public trust risk and national security sensitivity. Finally, the proposed rule would also clarify when reinvestigations of persons in national security positions are required.

Statement of Timothy F. Curry
U.S. Office of Personnel Management

November 20, 2013

The proposed rule is not intended to increase or decrease the number of positions designated as national security sensitive, but is intended to provide more specific guidance to agencies, in order to enhance the efficiency, accuracy, and consistency with which agencies make position designations. The previous regulations are now twenty years old and provide only general guidance. The new regulations are intended to clarify the requirements and procedures agencies should follow when designating national security positions by providing more detail and concrete examples. In addition, the new regulations will help agencies correctly determine the specific level of sensitivity for a position that is determined to affect national security, which in turn will help determine the type of background investigation that will be required.

Finally, the proposed rule addresses periodic reinvestigations in order to better coordinate the reinvestigation requirements for national security positions with the requirements already in place for security clearances under Executive Order 12968 and for public trust positions under Executive Order 13488. This will help ensure that the same reinvestigations can be used for multiple purposes and prevent costly duplication of effort.

The proposed rule was published in the Federal Register on May 28, 2013, with a comment period that closed 30 days later. OPM and ODNI are presently reviewing the comments from members of the public.

Kaplan v. Conyers

In *Kaplan v. Conyers*, the *en banc* U.S. Court of Appeals for the Federal Circuit, in a 7-3 decision, held that the Merit Systems Protection Board (MSPB) lacks jurisdiction to review the merits of Executive Branch risk determinations regarding eligibility to hold national security sensitive positions.

Conyers examined whether the MSPB, in reviewing an appeal of an adverse personnel action against an employee (i.e., a suspension, demotion, or removal), may review the merits of DoD's predictive judgment of national security risk. DoD had taken adverse actions against two employees after determining they were ineligible to perform national security duties. On appeal from the MPSB, the Federal Circuit concluded that the MSPB can review whether DoD's action is procedurally correct but cannot review whether DoD correctly exercised its predictive judgment of national security risk. The Federal Circuit held that in passing the Civil Service Reform Act of 1978 and later civil service laws, Congress did not give the MSPB this authority.

The Federal Circuit based its decision on long-standing precedent, specifically, the Supreme Court's 1988 decision in *Department of the Navy v. Egan* that the MSPB, in reviewing an appeal of an adverse action, cannot review the merits of an agency decision to deny the employee security clearance. The Federal Circuit held that *Egan* controlled all such national security determinations, not just those related to access to classified information.

Statement of Timothy F. Curry
U.S. Office of Personnel Management

November 20, 2013

The proposed rule discussed in the first part of this testimony was in no way related to the *Conyers* litigation. The proposed amendments were originally issued on December 14, 2010, before the MSPB issued its decisions in the *Conyers* case.

Thank you again for the opportunity to testify, and I look forward to answering any questions you may have.

United States Government Accountability Office

GAO

Testimony before the Subcommittee on the Efficiency and Effectiveness of Federal Programs and the Federal Workforce, Committee on Homeland Security and Governmental Affairs, U.S. Senate

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PERSONNEL SECURITY CLEARANCES

Actions Needed to Help Ensure Correct Designations of National Security Positions

Statement of Brenda S. Farrell, Director
Defense Capabilities and Management

November 20, 2013

GAO Highlights

Highlights of GAO-14-139T, a testimony before the Subcommittee on the Efficiency and Effectiveness of Federal Programs and the Federal Workforce, Committee on Homeland Security and Governmental Affairs, U.S. Senate

PERSONNEL SECURITY CLEARANCES

Actions Needed to Help Ensure Correct Designations of National Security Positions

Why GAO Did This Study

Personnel security clearances allow individuals access to classified information that, through unauthorized disclosure, can in some cases cause exceptionally grave damage to U.S. national security. A sound requirements process to determine whether a national security position requires access to classified information is needed to safeguard classified data and manage costs. The DNI reported that more than 4.9 million federal government and contractor employees held or were eligible to hold a security clearance in 2012. GAO has reported that the federal government spent over $1 billion to conduct background investigations (in support of security clearances and suitability determinations—the consideration of character and conduct for federal employment) in fiscal year 2011.

This testimony addresses policies and procedures executive branch agencies use when (1) first determining whether federal civilian positions require a security clearance and (2) periodically reviewing and revising or validating existing federal civilian position security clearance requirements. This testimony is based on a July 2012 GAO report (GAO-12-800), in which GAO (1) reviewed relevant federal guidance and processes, (2) examined agency personnel security clearance policies, (3) obtained and analyzed an OPM tool used for position designation, and (4) met with officials from ODNI and OPM because of their Directors' assigned roles as Security and Suitability Executive Agents. Because DOD and DHS grant the most security clearances, that report focused on the security clearance requirements of federal civilian positions within those agencies.

View GAO-14-139T. For more information, contact Brenda S. Farrell at (202) 512-3604 or farrellb@gao.gov.

What GAO Found

In July 2012, GAO reported that the Director of National Intelligence (DNI), as Security Executive Agent, had not provided executive branch agencies clearly defined policy and procedures to consistently determine if a position requires a personnel security clearance. Absent this guidance, agencies are using an Office of Personnel Management (OPM) position designation tool to determine the sensitivity and risk levels of civilian positions which, in turn, inform the type of investigation needed. OPM audits, however, found inconsistency in these position designations, and some agencies described problems implementing OPM's tool. For example, in an April 2012 audit OPM assessed the sensitivity levels of 39 positions, and its designations differed from the agency in 26 positions. Problems exist, in part, because OPM and the Office of the Director of National Intelligence (ODNI) did not collaborate on the development of this tool, and because their respective roles for suitability and security clearance reform are still evolving. As a result, to help determine the proper designation, GAO recommended that the DNI, in coordination with the Director of OPM, issue clearly defined policy and procedures for federal agencies to follow when determining if federal civilian positions require a security clearance. The DNI concurred with this recommendation. In May 2013, the DNI and OPM jointly drafted a proposed revision to the federal regulation on position designation which, if finalized in its current form, would provide additional requirements and examples of position duties at each sensitivity level. GAO also recommended that once those policies and procedures are in place, the DNI and the Director of OPM, in their roles as Executive Agents, collaborate to revise the position designation tool to reflect the new guidance. ODNI and OPM concurred with this recommendation and recently told GAO that they are revising the tool.

GAO also reported in July 2012 that the DNI had not established guidance to require agencies to periodically review and revise or validate existing federal civilian position designations. GAO reported that Department of Defense (DOD) and Department of Homeland Security (DHS) component officials were aware of the requirement to keep the number of security clearances to a minimum, but were not always required to conduct periodic reviews and validations of the security clearance needs of existing positions. GAO found that without such a requirement, executive branch agencies may be hiring and budgeting for initial and periodic security clearance investigations using position descriptions and security clearance requirements that do not reflect current national security needs. Further, since reviews are not done consistently, executive branch agencies cannot have assurances that they are keeping the number of positions that require security clearances to a minimum. Therefore, GAO recommended in July 2012 that the DNI, in coordination with the Director of OPM, issue guidance to require executive branch agencies to periodically review and revise or validate the designation of all federal civilian positions. As of October 2013, ODNI and OPM are finalizing revisions to the federal regulation on position designation. While the proposed regulation requires agencies to conduct a one-time reassessment of position designation within 24 months of the final rule's effective date, it does not require a periodic reassessment of positions' need for access to classified information. GAO continues to believe that periodic reassessment is important.

Chairman Tester, Ranking Member Portman, and Members of the Subcommittee:

Thank you for the opportunity to be here to discuss executive branch agencies' requirements for personnel to have access to classified information. As you know, my recent testimony on the government-wide security clearance process before your Subcommittee on June 20, 2013 included a discussion of our work on the steps that executive branch agencies use to first determine whether a federal civilian position requires access to classified information.[1] Today, I am here to elaborate on that process and report on the extent of progress by executive branch agencies in implementing our recommendations.

Personnel security clearances allow federal government and industry personnel (contractors) to gain access to classified information that, through unauthorized disclosure, can in some cases cause exceptionally grave damage to U.S. national security. In 2008, I testified that developing a sound requirements process to determine whether a position requires a security clearance for access to classified information is important because unnecessary requests for clearances have the potential to increase investigative workload and related costs.[2] As you know, a high volume of clearances continue to be processed and a sound requirements determination process is needed to effectively manage costs, since agencies spend significant amounts annually on national security and other background investigations.

In addition to cost implications, limiting the access to classified information and reducing the associated risks to national security underscore the need for executive branch agencies to have a sound process to determine which positions require a security clearance. In 2012, the Director of National Intelligence (DNI) reported that more than 4.9 million federal government and contractor employees held or were

[1]GAO, *Personnel Security Clearances: Further Actions Needed to Improve the Process and Realize Efficiencies*, GAO-13-728T (Washington, D.C.: June 20, 2013).

[2]GAO, *Personnel Clearances: Key Factors to Consider in Efforts to Reform Security Clearance Processes*, GAO-08-352T (Washington, D.C.: Feb. 27, 2008); GAO, *Personnel Clearances: Key Factors for Reforming the Security Clearance Process*, GAO-08-776T (Washington, D.C.: May 22, 2008); and GAO, *Personnel Security Clearances: Preliminary Observations on Joint Reform Efforts to Improve the Governmentwide Clearance Eligibility Process*, GAO-08-1050T (Washington, D.C.: July 30, 2008).

eligible to hold a security clearance.[3] Furthermore, in fiscal year 2011, the federal government spent over $1 billion to conduct more than 2 million background investigations in support of both personnel security clearances and suitability determinations[4] for government employment outside the intelligence community.

My statement today will primarily discuss our July 2012 report in which we evaluated federal government practices for identifying federal civilian positions that require personnel security clearances.[5] Specifically, my statement will address policies and procedures that executive agencies use (1) when first determining whether federal civilian positions require a security clearance and (2) to periodically review and revise or validate existing federal civilian position security clearance requirements.

My statement is based primarily on our July 2012 report on defining policy for civilian position requirements.[6] A list of products from our body of work focused on the personnel security clearance process appears at the end of my statement. As part of the work for our 2012 report, we reviewed relevant executive orders and federal guidance and processes, examined agency personnel security clearance policies, obtained and analyzed an Office of Personnel Management (OPM) tool used for position designation, and interviewed executive branch agency officials. Specifically, the scope of our work focused on the security clearance requirements of federal civilian positions from selected components within the Department of Defense (DOD) and Department of Homeland Security (DHS), due to the volume of clearances that these two agencies process. Further, as part of our ongoing effort to determine the status of agency actions to address our prior recommendations, we reviewed the current proposal to revise a relevant federal regulation regarding position designation.

[3]Office of the Director of National Intelligence, *2012 Report on Security Clearance Determinations* (January 2013).

[4]Determinations of suitability for government employment in positions in the competitive service and for career appointment in the Senior Executive Service include consideration of aspects of an individual's character or conduct that may have an effect on the integrity or efficiency of the service.

[5]GAO, *Security Clearances: Agencies Need Clearly Defined Policy for Determining Civilian Position Requirements*, GAO-12-800 (Washington, D.C.: July 12, 2012).

[6]GAO-12-800.

The work upon which this testimony is based was conducted in accordance with generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives. Further details about the scope and methodology can be found in each of these related products.

Background

In light of delays in completing security clearance background investigations and adjudicative decisions, as well as a significant backlog of clearances to be processed, Congress passed the Intelligence Reform and Terrorism Prevention Act of 2004 (IRTPA),[7] which set objectives and established requirements for improving the personnel security clearance process, including improving the timeliness of the clearance process, achieving interagency reciprocity, establishing an integrated database to track investigative and adjudicative information, and evaluating available technology for investigations and adjudications.

In July 2008, Executive Order 13467 designated the DNI as the Security Executive Agent, who is responsible for developing uniform and consistent policies and procedures to ensure the effective, efficient, and timely completion of background investigations and adjudications relating to determinations of eligibility for access to classified information and eligibility to hold a sensitive position.[8] Additionally, the order designated the Director of OPM as the Suitability Executive Agent. Determinations of suitability for government employment include consideration of aspects of an individual's character or conduct. Accordingly, the Suitability Executive Agent is responsible for developing and implementing uniform and consistent policies and procedures to ensure the effective, efficient, and timely completion of investigations and adjudications relating to determinations of suitability.

[7]Pub. L. No. 108-458 (2004) (relevant sections codified at 50 U.S.C. § 3341).

[8]Positions designated as sensitive are any positions within a department or agency where the occupant could bring about, by virtue of the nature of the position, a material adverse effect on national security.

The order also established a Suitability and Security Clearance Performance Accountability Council, commonly known as the Performance Accountability Council,[9] to be the government-wide governance structure responsible for driving implementation and overseeing security and suitability reform efforts. Further, the executive order designated the Deputy Director for Management at the Office of Management and Budget (OMB) as the chair of the council and states that agency heads shall assist the Performance Accountability Council and Executive Agents in carrying out any function under the order, as well as implementing any policies or procedures developed pursuant to the order.

The relevant orders and regulations that guide the process for designating national security positions include executive orders and federal regulations. For example, Executive Order 10450, which was originally issued in 1953, makes the heads of departments or agencies responsible for establishing and maintaining effective programs for ensuring that civilian employment and retention is clearly consistent with the interests of national security. Agency heads are also responsible for designating positions within their respective agencies as sensitive if the occupant of that position could, by virtue of the nature of the position, bring about a material adverse effect on national security.[10]

In addition, Executive Order 12968, issued in 1995, makes the heads of agencies—including executive branch agencies and the military departments—responsible for establishing and maintaining an effective program to ensure that access to classified information by each employee is clearly consistent with the interests of national security. This order also

[9]The Performance Accountability Council is comprised of the Director of National Intelligence as the Security Executive Agent, the Director of OPM as the Suitability Executive Agent, and the Deputy Director for Management, OMB, as the chair with the authority to designate officials from additional agencies to serve as members. As of June 2012, the council included representatives from the Departments of Defense, Energy, Health and Human Services, Homeland Security, State, Treasury, and Veterans Affairs, and the Federal Bureau of Investigation.

[10]Sensitivity level is based on the potential of the occupant of a position to bring about a material adverse effect on national security. Some factors include whether the position requires access to classified information or involves the formulation of security-related policy. The sensitivity level of a position then informs the type of background investigation required of the individual in that position. The relationship between sensitivity and resulting clearances is detailed in Figure 1.

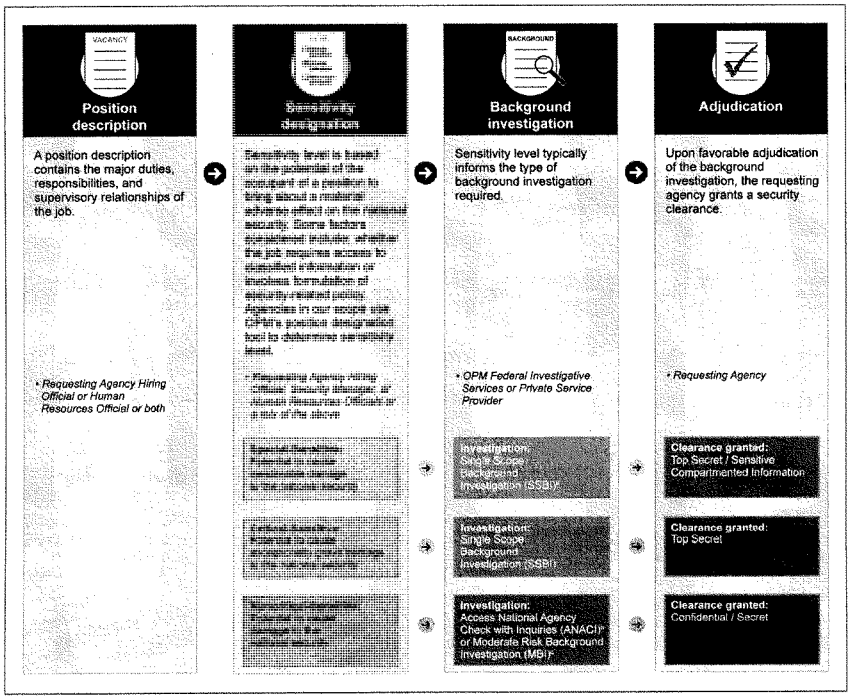
states that, subject to certain exceptions, eligibility for access to classified information shall only be requested and granted on the basis of a demonstrated, foreseeable need for access. Further, part 732 of Title 5 of the Code of Federal Regulations provides requirements and procedures for the designation of national security positions, which include positions that (1) involve activities of the government that are concerned with the protection of the nation from foreign aggression or espionage, and (2) require regular use of or access to classified national security information.[11]

Part 732 of Title 5 of the Code of Federal Regulations also states that most federal government positions that could bring about, by virtue of the nature of the position, a material adverse effect on national security must be designated as a sensitive position and require a sensitivity level designation. The sensitivity level designation determines the type of background investigation required, with positions designated at a greater sensitivity level requiring a more extensive background investigation. Part 732 establishes three sensitivity levels—special-sensitive, critical-sensitive, and noncritical-sensitive—which are described in figure 1. According to OPM, positions that an agency designates as special-sensitive and critical-sensitive require a background investigation that typically results in a top secret clearance. Noncritical-sensitive positions typically require an investigation that supports a secret or confidential clearance. OPM also defines non-sensitive positions that do not have a national security element, but still require a designation of risk for suitability purposes. That risk level informs the type of investigation required for those positions. Those investigations include aspects of an individual's character or conduct that may have an effect on the integrity or efficiency of the service.

As previously mentioned, DOD and DHS grant the most security clearances. Figure 1 illustrates the process used by both DOD and DHS to determine the need for a personnel security clearance for a federal civilian position generally used government-wide.

[11]Those requirements in Part 732 apply to national security positions in the competitive service, Senior Executive Service positions filled by career appointment within the executive branch, and certain excepted service positions.

Figure 1: Departments of Homeland Security and Defense Security Clearance Determination Process for Federal Civilian Positions



Source: GAO analysis of Department of Homeland Security (DHS) and Department of Defense (DOD) data.

[a]A Single Scope Background Investigation (SSBI) is conducted so that an individual can obtain a top secret clearance (including Sensitive Compartmented Information) and includes a review of the locations where an individual has lived, attended school, and worked. In addition, an SSBI includes interviews with four references who have social knowledge of the subject, interviews with former spouses, and a financial record check.

[b]An Access National Agency Check and Inquiries (ANACI) is used for the initial investigation for federal employees at the confidential and secret access levels. It consists of employment checks,

education checks, residence checks, reference checks, and law enforcement agency checks, as well as a National Agency Check, which includes data from military records and the Federal Bureau of Investigation's investigative index.

[c]A Moderate Risk Background Investigation (MBI) includes an ANACI and provides issue-triggered enhanced subject interviews with issue resolution. DHS uses the MBI for non-critical sensitive positions when a position is first designated as high, moderate, or low risk.

DNI and OPM are Collaborating to Finalize Clearly Defined Policy Guidance for Determining When a Federal Civilian Position Needs a Security Clearance

During the course of our 2012 review, we found that the executive branch had not issued clearly defined policy guidance for determining when a federal civilian position needs a security clearance.[12] In the absence of such guidance, agencies are using a position designation tool that OPM designed to determine the sensitivity and risk levels of civilian positions that, in turn, inform the type of investigation needed. Further, we found that OPM's position designation tool lacked input from the DNI and that audits had revealed problems with the use of OPM's tool, leading to some incorrect position designations.

The DNI Has a Role to Guide Agencies in Designating Positions for Security Clearances, But Has Not Yet Provided Agencies with Clearly Defined Policy Guidance

The first step in the personnel security clearance process is to determine if the occupant of a federal position needs a security clearance to effectively and efficiently conduct work. However, we found in July 2012 that the DNI had not provided agencies with clearly defined policy through regulation or other guidance to help ensure that executive branch agencies use appropriate and consistent criteria when determining if positions require a security clearance. According to Executive Order 13467, issued in June 2008, the DNI, as the Security Executive Agent, is responsible for developing uniform policies and procedures to ensure the effective, efficient, and timely completion of investigations and adjudications relating to determinations of eligibility for access to classified information or to hold a sensitive position. Further, the order states that agency heads shall assist the Performance Accountability Council and Executive Agents in carrying out any function under the order, as well as implementing any policies or procedures developed pursuant to the order. Although agency heads retain the flexibility to make determinations regarding which positions in their agency require a

[12]GAO-12-800.

security clearance, the DNI, in its capacity as Security Executive Agent, is well positioned to provide guidance to help align the personnel security clearance process.

Determining the requirements of a federal position includes assessing both the risk and sensitivity level associated with a position, which includes consideration of whether that position requires access to classified information and, if required, the level of access. Security clearances are generally categorized into three levels of access: top secret, secret, and confidential.[13] The level of classification denotes the degree of protection required for information and the amount of damage that unauthorized disclosure could reasonably be expected to cause to national defense or foreign relations.

OPM Has Developed a Tool to Help Agencies Determine the Proper Sensitivity Level for Most Federal Positions; However the Tool Was Not Developed with Input from the DNI

In the absence of clearly defined guidance to help ensure that executive branch agencies use appropriate and consistent criteria when determining if positions require a personnel security clearance, agencies are using an OPM-designed tool to determine the sensitivity and risk levels of civilian positions which, in turn, inform the type of investigation needed. We reported in July 2012 that in order to assist with position designation, the Director of OPM—the Executive Agent for Suitability—has developed a process that includes a position designation system and corresponding automated tool to guide agencies in determining the proper sensitivity level for the majority of federal positions.[14] This tool—namely, the Position Designation of National Security and Public Trust Positions—enables a user to evaluate a position's national security and suitability requirements so as to determine a position's sensitivity and risk levels, which in turn dictate the type of background investigation that will be required for the individual who will occupy that position.

[13]A top secret clearance is generally also required for access to Sensitive Compartmented Information—classified intelligence information concerning or derived from intelligence sources, methods, or analytical processes that is required to be protected within formal access control systems established and overseen by the Director of National Intelligence.

[14]According to OPM's Federal Investigations Notice No. 10-06, *Position Designation Requirements* (Aug. 11, 2010), the tool is recommended for all agencies requesting OPM investigations and required for all positions in the competitive service, positions in the excepted service where the incumbent can be noncompetitively converted to the competitive service, and career appointments in the Senior Executive Service.

In most agencies outside the Intelligence Community, OPM conducts the background investigations for both suitability and security clearance purposes. The tool does not directly determine whether a position requires a clearance, but rather helps determine the sensitivity level of the position. The determination to grant a clearance is based on whether a position requires access to classified information and, if access is required, the responsible official will designate the position to require a clearance.

OPM developed the position designation system and automated tool for multiple reasons. First, OPM determined through a 2007 initiative[15] that its existing regulations and guidance for position designation were complex and difficult to apply, resulting in inconsistent designations. As a result of a recommendation from the initiative, OPM created a simplified position designation process in 2008. Additionally, OPM officials noted that the tool is to support the goals of the security and suitability reform efforts, which require proper designation of national security and suitability positions.

OPM first introduced the automated tool in November 2008, and issued an update of the tool in 2010. In August 2010, OPM issued guidance (1) recommending all agencies that request OPM background investigations use the tool, and (2) requiring agencies to use the tool for all positions in the competitive service, positions in the excepted service where the incumbent can be noncompetitively converted to the competitive service, and career appointments in the Senior Executive Service.[16] Both DOD and DHS components use the tool. In addition, DOD issued guidance in September 2011[17] and August 2012[18] requiring its personnel to use OPM's tool to determine the proper position sensitivity

[15]The Hadley-Springer commission was an initiative between OPM and the Assistant to the President for National Security Affairs that focused on simplifying the federal government investigative and adjudicative procedures to improve security requirements to determine eligibility for access to classified information, among other things.

[16]OPM's Federal Investigations Notice No. 10-06, *Position Designation Requirements* (Aug. 11, 2010).

[17]DOD, Washington Headquarters Services, *Implementation of the Position Designation Automated Tool* (Sept. 27, 2011).

[18]DOD Instruction 1400.25, Volume 731, *DoD Civilian Personnel Management System: Suitability and Fitness Adjudication For Civilian Employees* (Aug. 24, 2012).

designation. A DHS instruction requires personnel to designate all DHS positions—including positions in the DHS components—by using OPM's position sensitivity designation guidance, which is the basis of the tool.[19] Office of the Director of National Intelligence (ODNI) officials told us that they believe OPM's tool is useful for determining a position's sensitivity level. However, although the DNI was designated as the Security Executive Agent in 2008, ODNI officials noted that the DNI did not have input into recent revisions of OPM's position designation tool.

This lack of coordination for revising the tool exists, in part, because the execution of the roles and relationships between the Director of OPM and the DNI as Executive Agents are still evolving, although Executive Order 13467 defines responsibilities for each Executive Agent. Accordingly, we found in July 2012 that the Director of OPM and the DNI had not fully collaborated in executing their respective roles in the process for determining position designations. For example, OPM has had long-standing responsibility for establishing standards with respect to suitability for most federal government positions. Accordingly, the sections of the tool to be used for evaluating a position's suitability risk level are significantly more detailed than the sections designed to aid in designating the national security sensitivity level of the position. While most of OPM's position designation system, which is the basis of the tool, is devoted to suitability issues, only two pages are devoted to national security issues. Moreover, OPM did not seek to collaborate with the DNI when updating the tool in 2010.

During our review completed in 2012, human capital and security officials from DOD and DHS and the selected components we examined affirmed that they were using the existing tool to determine the sensitivity level required by a position. However, in the absence of clearly defined policy from the DNI and the lack of collaborative input into the tool's design, officials explained that they sometimes had difficulty in using the tool to designate the sensitivity level of national security positions.

Audits Show Problems with Position Designation

OPM regularly conducts audits of its executive branch customer agency personnel security and suitability programs, which include a review of position designation to assess the agencies' alignment with OPM's

[19]DHS Management Instruction 121-01-007, *Department of Homeland Security Personnel Suitability and Security Program* (June 2009).

position designation guidance. In the audit reports we obtained as part of our 2012 review, OPM found examples of inconsistency between agency position designation and OPM guidance, both before and after the implementation of OPM's tool. For instance, prior to the implementation of the tool, in a 2006 audit of an executive branch agency, OPM found that its sensitivity designations differed from the agency's designation in 13 of 23 positions.

More recently, after the implementation of the tool, in an April 2012 audit of a DOD agency, OPM assessed the sensitivity levels of 39 positions, and OPM's designations differed from the agency's designations in 26 of those positions. In the April 2012 report, the DOD agency agreed with OPM's recommendations related to position designation, and the audit report confirmed that the agency had submitted evidence of corrective action in response to the position designation recommendations. OPM provided us with the results of 10 audits that it had conducted between 2005 and 2012, and 9 of those audit reports reflected inconsistencies between OPM position designation guidance and determinations of position sensitivity conducted by the agency. OPM officials noted, however, that they do not have the authority to direct agencies to make different designations because Executive Order 10450 provides agency heads with the ultimate responsibility for designating which positions are sensitive positions. ODNI conducted a separate position designation audit in response to the Intelligence Authorization Act for Fiscal Year 2010.[20] In that 2011 report, ODNI found that the processes the executive branch agencies followed differed somewhat depending whether the position was civilian, military, or contractor.[21]

Agency Officials Raised Concerns with Designation Tool

During the course of our 2012 review, DOD and DHS officials raised concerns regarding the guidance provided through the tool and expressed that they had difficulty implementing it. Specifically, officials from DHS's U.S. Immigration and Customs Enforcement stated that the use of the tool occasionally resulted in inconsistency, such as over- or underdesignating a position, and expressed a need for additional clear, easily interpreted guidance on designating national security positions. DOD officials stated that they have had difficulty implementing the tool

[20]Pub. L. No. 111-259 (2010).

[21]Office of the Director of National Intelligence, *2011 Report on Position Requirements for Security Clearances, n.d.*

because it focuses more on suitability than security, and the national security aspects of DOD's positions are of more concern to them than the suitability aspects.

Further, an official from DOD's Office of the Under Secretary of Defense for Personnel and Readiness stated that the tool and DOD policy do not always align and that the tool does not cover the requirements for some DOD positions. For example, DOD's initial implementing guidance on using the tool stated that terms differ between DOD's personnel security policy and the tool, and the tool might suggest different position sensitivity levels than DOD policy required. Also, officials from the Air Force Personnel Security Office told us that they had challenges using the tool to classify civilian positions, including difficulty in linking the tool with Air Force practices for position designation. Moreover, an Air Force official stated a concern that the definition for national security positions is broadly written and could be considered to include all federal positions.

Because we found that the executive branch had not provided clear guidance for the designation of national security positions, we recommended that the DNI, in coordination with the Director of OPM and other executive branch agencies as appropriate, issue clearly defined policy and procedures for federal agencies to follow when determining if federal civilian positions require a security clearance. In written comments on our July 2012 report, the ODNI concurred with this recommendation and agreed that executive branch agencies require simplified and uniform policy guidance to assist in determining appropriate sensitivity designations.

We routinely monitor the status of agency actions to address our prior report recommendations. As part of that process, we found that a January 25, 2013 presidential memo authorized the DNI and OPM to jointly issue revisions to part 732 of Title 5 of the Code of Federal Regulations, which is intended to provide requirements and procedures for the designation of national security positions. Subsequently, ODNI and OPM drafted the proposed regulation, published it in the Federal Register on May 28, 2013, and obtained public comment on the regulation through June 27, 2013. ODNI and OPM officials told us they plan to jointly adjudicate public

comments and prepare the final regulation for approval from OMB during October 2013.[22]

In reviewing the proposed regulation, we found that it would, if finalized in its current form, meet the intent of our recommendation to issue clearly defined policy and procedures for federal agencies to follow when determining if federal civilian positions require a security clearance. Specifically, the proposed regulation appears to add significant detail regarding the types of duties that would lead to a critical-sensitive designation, or those national security positions which have the potential to cause exceptionally grave damage to national security. Critical-sensitive positions detailed in the proposed regulation include positions

- that develop or approve war plans, major or special military operations, or critical and extremely important items of war,
- involve national security policy-making or policy-determining positions,
- with investigative duties, including handling of completed counter-intelligence or background investigations,
- having direct involvement with diplomatic relations and negotiations,
- in which the occupants have the ability to independently damage public health and safety with devastating results, and
- in which the occupants have the ability to independently compromise or exploit biological select agents or toxins, chemical agents, nuclear materials, or other hazardous materials, among several others.

Further, we also recommended in 2012 that once clear policy and procedures for position designation are issued, the DNI and the Director of OPM should collaborate in their respective roles as Executive Agents to revise the position designation tool to reflect that guidance. ODNI concurred with this recommendation in its written comments on our report and stated that it planned to work with OPM and other executive branch

[22]Part 732 of Title 5 of the Code of Federal Regulations currently provides requirements and procedures for the designation of national security positions. OPM and ODNI are jointly reissuing and renumbering the proposed regulation in a new chapter IV, part 1400 of Title 5, Code of Federal Regulations.

agencies to develop a position designation tool that provides detailed descriptions of the types of positions where the occupant could bring about a material adverse impact to national security due to the duties and responsibilities of that position. OPM also concurred with this recommendation, stating that it was committed to revising the tool after revisions to position designation regulations are complete.

The proposed revisions to part 732 of Title 5 of the Code of Federal Regulations appeared in the Federal Register, but have not yet been issued, and we recommended that the position designation tool be revised once policies and procedures for position designation are issued. We note that the proposed regulation states that OPM issues, and periodically revises, a Position Designation System,[23] which describes in greater detail agency requirements for designating positions that could bring about a material adverse effect on the national security. Further, the proposed regulation would require that agencies use OPM's Position Designation System to designate the sensitivity level of each position covered by the regulation.

As part of our ongoing processes to monitor agency actions in response to our recommendations, ODNI and OPM officials told us that actions were underway to revise the tool. For example, officials stated that an interagency working group had been established to oversee the updates to the current tool, while also determining the way forward to creating a new tool, and that officials were developing a project plan to guide the revision process. We plan to continue to review OPM guidance on the Position Designation System and to review steps taken by OPM and the DNI to revise the associated position designation tool to determine if the revised regulation and actions taken to revise the tool meet the intent of our recommendation.

[23]OPM developed a process that includes a position designation system and corresponding automated tool to guide agencies in determining the proper sensitivity level for the majority of federal positions. OPM's Federal Investigations Notice No. 10-06, *Position Designation Requirements* (Aug. 11, 2010), states that the tool is recommended for all agencies requesting OPM investigations and required for all positions in the competitive service, positions in the excepted service where the incumbent can be noncompetitively converted to the competitive service, and career appointments in the Senior Executive Service.

The Executive Branch Does Not Have a Process for Periodically Reviewing and Validating Existing Security Clearance Designations for Civilian Positions

In July 2012, we reported that the executive branch did not have a consistent process for reviewing and validating existing security clearance requirements for federal civilian positions.[24] According to Executive Order 12968, the number of employees that each agency determines is eligible for access to classified information shall be kept to the minimum required, and, subject to certain exceptions, eligibility shall be requested or granted only on the basis of a demonstrated, foreseeable need for access. Additionally, Executive Order 12968 states that access to classified information shall be terminated when an employee no longer has a need for access, and that requesting or approving eligibility for access in excess of the actual requirements is prohibited.

Also, Executive Order 13467 authorizes the DNI to issue guidelines or instructions to the heads of agencies regarding, among other things, uniformity in determining eligibility for access to classified information. However, we reported in 2012 that the DNI had not issued policies and procedures for agencies to periodically review and revise or validate the existing clearance requirements for their federal civilian positions to ensure that clearances are 1) kept to a minimum and 2) reserved only for those positions with security clearance requirements that are in accordance with the national security needs of the time. Position descriptions not only identify the major duties and responsibilities of the position, but they also play a critical role in an agency's ability to recruit, develop, and retain the right number of individuals with the necessary skills and competencies to meet its mission. Position descriptions may change, as well as the national security environment as observed after September 11, 2001.

During our 2012 review of several DOD and DHS components, we found that officials were aware of the requirement to keep the number of security clearances to a minimum but were not always subject to a standard requirement to review and validate the security clearance needs of existing positions on a periodic basis. We found, instead, that agencies' policies provide for a variety of practices for reviewing the clearance needs of federal civilian positions. In addition, agency officials told us that their policies are implemented inconsistently. DOD's personnel security

[24]GAO-12-800.

regulation and other guidance[25] provides DOD components with criteria to consider when determining whether a position is sensitive or requires access to classified information, and some DOD components also have developed their own guidance. For example, we found that:

- An Air Force Instruction requires commanders to review all military and civilian position designations annually to ensure proper level of access to classified information.[26]
- The Army issued a memorandum in 2006 that required an immediate review of position sensitivity designations for all Army civilian positions by the end of the calendar year and requires subsequent reviews biennially.[27] That memorandum further states that if a review warrants a change in position sensitivity affecting an individual's access to classified information, then access should be administratively adjusted and the periodic reinvestigation submitted accordingly. However, officials explained that improper position sensitivity designations continue to occur in the Army because they have a limited number of personnel in the security office relative to workload, and they only spot check clearance requests to ensure that they match the level of clearance required.
- Officials from DOD's Washington Headquarters Services told us that they have an informal practice of reviewing position descriptions and security designations for vacant or new positions, but they do not have a schedule for conducting periodic reviews of personnel security designations for already-filled positions.

According to DHS guidance, supervisors are responsible for ensuring that (1) position designations are updated when a position undergoes major changes (e.g., changes in missions and functions, job responsibilities, work assignments, legislation, or classification standards), and (2) position security designations are assigned as new positions are

[25]DOD 5200.2-R, *Department of Defense Personnel Security Program* (January 1987, reissued incorporating changes Feb. 23, 1996), as modified by Under Secretary of Defense Memorandum, *Implementation of the Position Designation Automated Tool* (May 10, 2011).

[26]Air Force Instruction 31-501, *Personnel Security Program Management* (Jan. 27, 2005).

[27]Army Director of Counterintelligence, Human Intelligence, Disclosure and Security Memorandum, *Civilian Position Sensitivity Review* (Dec. 31, 2006).

created. Some components have additional requirements to review position designation more regularly to cover positions other than those newly created or vacant. For example,

- U.S. Coast Guard guidance[28] states that hiring officials and supervisors should review position descriptions even when there is no vacancy and, as appropriate, either revise or review them.
- According to officials in U.S. Immigration and Customs Enforcement, supervisors are supposed to review position descriptions annually during the performance review process to ensure that the duties and responsibilities on the position description are up-to-date and accurate. However, officials stated that U.S. Immigration and Customs Enforcement does not have policies or requirements in place to ensure any particular level of detail in that review.

Some of the components we met with as part of our 2012 review were, at that time, in the process of conducting a onetime review of position designations. In 2012, Transportation Security Administration officials stated that they reevaluated all of their position descriptions during the last 2 years because the agency determined that the re-evaluation of its position designations would improve operational efficiency by ensuring that positions were appropriately designated by using OPM's updated position designation tool. Further, those officials told us that they review position descriptions as positions become vacant or are created. Between fiscal years 2010 and 2011, while the Transportation Security Administration's overall workforce increased from 61,586 to 66,023, the number of investigations for top secret clearances decreased from 1,483 to 1,127.

Conducting background investigations is costly. The federal government spent over $1 billion to conduct background investigations in fiscal year 2011. Furthermore, this does not include the costs for the adjudication or other phases of the personnel security clearances process. DOD and DHS officials acknowledged that overdesignating a position can result in expenses for unnecessary investigations. When a position is overdesignated, additional resources are unnecessarily spent conducting

[28]U.S. Coast Guard, CG-121, *Civilian Hiring Guide for Supervisors and Managers*, ver. 2 (June 11, 2010).

the investigation and adjudication of a background investigation that exceeds agency requirements.

Specifically, the investigative workload for a top secret clearance is about 20 times greater than that of a secret clearance because it must be periodically reinvestigated twice as often as secret clearance investigations (every 5 years versus every 10 years) and requires 10 times as many investigative staff hours. The fiscal year 2014 base price for an initial top secret clearance investigation conducted by OPM is $3,959 and the cost of a periodic reinvestigation is $2,768. The base price of an investigation for a secret clearance is $272. If issues are identified during the course of an investigation for a secret clearance, additional costs may be incurred.

Agencies employ varying practices because the DNI has not established a requirement that executive branch agencies consistently review and revise or validate existing position designations on a recurring basis. Such a recurring basis could include reviewing position designations during the periodic reinvestigation process. Without a requirement to consistently review, revise, or validate existing security clearance position designations, executive branch agencies—such as DOD and DHS—may be hiring and budgeting for both initial and periodic security clearance investigations using position descriptions and security clearance requirements that do not reflect national security needs. Finally, since reviews are not being done consistently, DOD, DHS, and other executive branch agencies cannot have reasonable assurance that they are keeping to a minimum the number of positions that require security clearances on the basis of a demonstrated and foreseeable need for access.

Therefore, we recommended in July 2012 that the DNI, in coordination with the Director of OPM and other executive branch agencies as appropriate, issue guidance to require executive branch agencies to periodically review and revise or validate the designation of all federal civilian positions. In written comments on that report, the ODNI concurred with this recommendation and stated that as duties and responsibilities of federal positions may be subject to change, it planned to work with OPM and other executive branch agencies to ensure that position designation policies and procedures include a provision for periodic reviews. OPM stated in its written comments to our report that it would work with the DNI on guidance concerning periodic reviews of existing designations, once pending proposed regulations are finalized.

ODNI and OPM are currently in the process of finalizing revisions to the position designation federal regulation. As part of our ongoing processes to routinely monitor the status of agency actions to address our prior recommendations, we note that the proposed regulation would newly require agencies to conduct a one-time reassessment of position designations within 24 months of the final regulation's effective date, which is an important step towards ensuring that the current designations of national security positions are accurate. However, the national security environment and the duties and descriptions of positions may change over time, thus the importance of periodic review or validation. The proposed regulation does not appear to require a periodic reassessment of positions' need for access to classified information as we recommended. We believe this needs to be done and, as part of monitoring the status of our recommendation, we will continue to review the finalized federal regulation and any related guidance that directs position designation to determine whether periodic review or validation is required.

In conclusion, the correct designation of national security positions is a critical first step for safeguarding national security and preventing unnecessary and costly background investigations. We are encouraged that in response to our recommendations, ODNI and OPM have drafted a revised federal regulation and plan to jointly address comments and finalize these regulations. We will continue to monitor the outcome of the final federal regulation as well as other agency actions to address our remaining recommendations.

Chairman Tester, Ranking Member Portman, and Members of the Subcommittee, this concludes my prepared statement. I would be pleased to answer any questions that you or the other Members of the Subcommittee may have at this time.

GAO Contacts and Acknowledgement

For further information on this testimony, please contact Brenda S. Farrell, Director, Defense Capabilities and Management, who may be reached at (202) 512-3604 or farrellb@gao.gov. Contact points for our Offices of Congressional Relations and Public Affairs may be found on the last page of this statement. GAO staff who made key contributions to this testimony include Lori A. Atkinson (Assistant Director), Renee Brown, Sara Cradic, Jeffrey Heit, Erik Wilkins-McKee, Suzanne M. Perkins, and Michael Willems.

AFGE Congressional Testimony

STATEMENT BY

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BEFORE THE

COMMITTEE ON HOMELAND SECURITY
AND GOVERNMENTAL AFFAIRS

ON

SAFEGUARDING OUR NATION'S SECRETS:
EXAMINING THE NATIONAL SECURITY WORKFORCE

NOVEMBER 20, 2013

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Mr. Chairman, Ranking Member Portman, and Members of the Committee, my name is David A. Borer, and I am the General Counsel of the American Federation of Government Employees, AFL-CIO (AFGE). On behalf of AFGE and the more than 650,000 federal employees who we represent, including tens of thousands of long-term employees who occupy positions presently designated as "sensitive," I thank you for the opportunity to testify today. AFGE has grave concerns about the recent decision issued by the United States Court of Appeals for the Federal Circuit in *Kaplan v. Conyers*, and about the proposed rule concerning the designation of positions as national security sensitive, issued jointly by the Office of Personnel Management (OPM) and the Office of the Director of National Intelligence (ODNI).

The *Conyers* decision and the proposed regulations strike at the heart of the merit system which, for decades, has been the foundation of federal civil service. *Conyers*, whether viewed as limited to the Department of Defense (DoD) or not, eliminated a fundamental protection for a vast and growing number of federal employees that was granted to them by the Civil Service Reform Act of 1978 (CSRA): the right to a meaningful hearing before the U.S. Merit Systems Protection Board (MSPB or Board). The regulations proposed jointly by OPM and ODNI exacerbate the unfairness and faulty logic of the *Conyers* decision by allowing agencies to pick and choose which employees will have the right to due process before the MSPB and which employees will not.

If both *Conyers* and the proposed regulations are allowed to stand, the likely result will be that Executive branch agencies will have the unchecked power to deprive hundreds of thousands of employees of the protections and rights that Congress gave them in the CSRA. By unilaterally designating a position they hold as sensitive, regardless of whether the position entails access to classified information, Executive branch agencies will shield routine personnel decisions from review by the MSPB. That, Senators, is likely to be an irresistible invitation to abuse. AFGE thus looks forward to working with the members of this Committee to restore fairness and common sense to the due process protections and rights which have historically protected the federal workforce.

Conyers and the proposed regulations are, indeed, only the latest injustices federal workers have faced over the last several years. Dedicated public servants have seen their pay frozen and their retirement and health care threatened. They have undergone two rounds of furloughs as a result, first, of the sequestration cuts and then the pointless government shutdown. Many were left unsure of how or when they would be able to pay their bills and make ends meet. Some untold number fell into debt, or fell deeper into debt. Despite these indignities, AFGE's members and all federal employees continued to serve our country with care and resolve, many of them without pay for the duration of the shutdown. Federal employees are committed to protecting their fellow citizens and providing crucial public services to all Americans. It is time that they were treated fairly for doing so.

Kaplan v. Conyers

This brings me to *Conyers*. One of the most important facts here is that *Conyers* does *not* pertain to individuals with security clearances. It is *not* a case about classified information. The

individuals in *Conyers*, Rhonda Conyers and Devon Northover, were an accounting technician and a grocery store clerk, respectively. They did not hold security clearances and they did not access classified information. Mr. Northover, in particular, worked in a commissary – the very same commissary where he continued to work following his demotion based on his "loss of eligibility to occupy a sensitive position." Ms. Conyers worked for the Defense Finance and Accounting Service (DFAS) for 19 years, without incident, before DFAS indefinitely suspended her and then removed her based on her loss of eligibility to occupy a sensitive position. Both Conyers and Northover, in lower paid positions to begin with, lost their eligibility because of delinquent debt; modest amounts of delinquent debt similar to that held by many Americans. Both of them accrued their debt based on circumstances outside their control: divorce in one case and a death in the family in the other. In other words, Rhonda and Devon were both penalized because of their credit scores. The penalty came, ironically, in the form of a loss of pay.

Ms. Conyers and Mr. Northover are not unique. Like most Americans, federal employees have been hit hard by America's recession and economic troubles. Many have struggled to make ends meet. But unlike most Americans, federal employees face baseless accusations of disloyalty to their county based on nothing more a poor credit report. This is deeply troubling to AFGE, and should be a real concern for this Committee. The implication that financial hardship equates to disloyalty, for employees with no access to classified information in the first place, is unsupported and offensive. AFGE has, moreover, found that the practice of penalizing employees based on their credit scores has not been uniform in its impact or its application; except insofar as it disproportionately impacts employees over forty years old, female employees, and employees of color.

Federal employees are more than credit scores and financial statements. They are mothers and fathers, brothers and sisters, friends and neighbors. They are also your constituents. They have mortgages to pay, financial obligations to meet, and families to raise, like any other American. They work hard every day to make America a safer, stronger, more secure place for their fellow citizens. And, for decades, the MSPB has provided them with a safety net against arbitrary or unfounded personnel actions.

Now, let me explain exactly what the Federal Circuit's decision in *Conyers* took away. In 1988, the Supreme Court decided *Department of the Navy v. Egan*. The court in *Egan* held that, notwithstanding the CSRA, the MSPB could not review the merits of security clearance determination in the course of adjudicating an adverse action, i.e. an agency action made appealable to the MSPB by the CSRA. Courts uniformly, at least up until *Conyers*, interpreted *Egan* as limited to security clearance determinations.

Since 1994 (when *Egan* was already the law), the MSPB also distinguished *Egan* and exercised it full statutory scope of review in cases involving so-called "sensitive" duties or positions that did not require a security clearance. For example, in *Jacobs v. Dep't of the Army*, 62 M.S.P.R. 688, 695 (1994), the Board held that:

> The Supreme Court's decision in *Egan* was narrow in scope and specifically applied only to security clearance revocations. As the protector of the government's merit systems, the Board is not eager to

> expand the scope of the rationale in *Egan* to divest federal employees whose positions do not require a security clearance of basic protections against non-meritorious agency actions.

The MSPB continued to distinguish *Egan* for more than a dozen years. *See Adams v. Dep't of the Army*, 105 M.S.P.R. 50 (2007), *aff'd*, 273 Fed. Appx. 947 (Fed. Cir. 2008) (unpublished).

The MSPB thus held in *Conyers* and *Northover*, the companion case to *Conyers*, that in the absence of a security clearance, *Egan* did not apply so as to restrict its scope of review of an employee's appeal. The MSPB did so for very good reasons, not the least of which was to avoid sanctioning arbitrary agency conduct and to further its enforcement of the CSRA.

The MSPB has been charged with enforcing the CSRA since it was enacted in 1978. The MSPB's mandate is to serve as a vigorous defender of the merit system in the federal workplace. Chief among its functions is protecting federal employees from arbitrary disciplinary actions, inappropriate favoritism, and coercion for partisan political purposes. When a federal employee faces discipline or termination, he or she may challenge that decision before the Board. The Board reviews the decision to determine whether or not it complies with the principles of the CSRA. In short, the Board ensures accountability. Thus, for the past 35 years, federal employees have turned to the Board when their employers abuse their authority by, for example, arbitrary action, whistleblower reprisal or other forms or prohibited discrimination. The Board ensures our federal workforce runs efficiently and effectively. Board oversight remains one of the most important due process protections for federal employees and candidates for federal employment.

Conyers washed this carefully constructed statutory scheme away and opened the door to arbitrary, and unchecked, Executive agency decision-making. The Federal Circuit essentially extended *Egan* to any determination, made in the sole discretion of an agency (or more accurately, any number of agency personnel), that may be crammed under the aegis of national security. The Federal Circuit, moreover, rejected the text, structure and history of the CSRA, along with the plain language of *Egan*, to hold that the MSPB may not review the merits of an agency determination that an employee is ineligible to hold a sensitive position, regardless of whether the position requires a security clearance, and regardless of whether the agency had any genuine basis for designated the position as sensitive in the first instance.

This means that, just as in the *Northover* case where the agency altered his eligibility determination based on the existence of litigation (his appeal), an agency may make or alter a sensitivity designation for any reason and without any oversight. In other words, an agency may now designate any position, no matter how absurd, as a national security position. An agency may then also go on to find an employee ineligible to occupy that position for any reason, including an invidious or illegal reason, and at the same time shield its action entirely from third-party review by the MSPB. For example, *Conyers* permits an agency to find an employee ineligible based on one late car payment or one late mortgage payment and withholds any neutral review of that finding.

AFGE believes this result is contrary to the CSRA and basic principles of good government, not to mention a functional system of checks and balances. *Conyers* leaves no

safeguard in place to check the Executive's control over federal employees or its conclusory assertions of national security. The Board and the dissenting judges in the Federal Circuit got it right. This is why AFGE will continue to press this issue both in court, in what is now the *Northover* case, and before Congress. *Conyers* should not be allowed to stand.

The Regulations Proposed by OPM and ODNI

AFGE previously submitted public comments concerning the regulations proposed by OPM and ODNI on this topic. AFGE was one of many organizations that condemned the proposed regulations. We strongly urged OPM and ODNI to withdraw the proposed regulations in their entirety. Our position has not changed. The regulations add to the lack of accountability endorsed by *Conyers*. At the same time, the regulations provide precious little guidance to agencies.

For example, the regulations provide no oversight of agency position designation determinations. They also fail to provide meaningful instruction, beyond listing a number of ill-defined examples, regarding how agencies should determine which positions should be designated as sensitive, or even which agency personnel should be tasked with making these decisions. Most importantly, the proposed regulations present a stark contrast to the rule proposed by OPM in 2010. The 2010 rule reminded agencies, for example, that to designate any position as a "national security position," an agency must make an affirmative determination that the occupant of that position could bring about a material adverse effect on national security through neglect, action or inaction. Similarly, the 2010 Rule reminded agencies that sensitivity designations must be based on the position's responsibilities, not the broad mission of the agency. The proposed regulations, however, opt for caprice in the guise of efficiency.

The regulations' sweeping notions of what might constitute a national security position also amplify the negative impact of *Conyers*. As the proposed regulations have been written, it is difficult to think of any position that an agency could not designate as a sensitive, national security position. The regulations also do not say whether such a designation depends on the agency's overall mission or the actual responsibilities of a particular position. The proposed regulations, instead, invite an agency's imagination to run wild. For example, the regulations are so broad that they would embrace the designation of every civilian employee at DoD as sensitive; no matter what they did, or where or how they did it. *Conyers* then says that once such a designation has been made, the MSPB may no longer review the merits of an agency eligibility determination; no matter what the employee did and no matter why the agency decided to find the employee ineligible. The exception thus entirely swallows the rule; which goes against the very purpose of the CSRA. The regulations should be scrapped.

At best, the jointly proposed rule is comprised of rushed, poorly-crafted, and imprecise regulations affecting hundreds of thousands of employees. At worst, it is a deliberate attempt to nullify the CSRA. AFGE therefore continues to urge OPM and ODNI to withdraw the proposed regulation or bring it into conformity with the many changes suggested by AFGE. Without major changes, or withdrawal, these regulations have the potential to assist in the destruction of a system of oversight and accountability that has strengthened our federal workforce for decades.

Conclusion

Thank you again for inviting AFGE to provide this testimony. AFGE is committed to protecting the rights of its 650,000 members. We are eager to continue improving our federal workforce to serve our country. We look forward to working to improve our merit system and to maintain the system of checks and balances envisioned by the CSRA.

POGO PROJECT ON GOVERNMENT OVERSIGHT
Exposing Corruption. Exploring Solutions.

Testimony by Angela Canterbury, Director of Public Policy, Project On Government Oversight, before the Senate Homeland Security and Governmental Affairs Subcommittee on Efficiency and Effectiveness of Federal Programs and the Federal Workforce on "Safeguarding Our Nation's Secrets: Examining the National Security Workforce" November 20, 2013

Chairman Tester, Ranking Member Portman, and Members of the Subcommittee, thank you for your oversight of the national security workforce and for inviting me to testify today.

I am the Director of Public Policy at the Project On Government Oversight (POGO). Founded in 1981, POGO is a nonpartisan independent watchdog that champions good government reforms. POGO's investigations into corruption, misconduct, and conflicts of interest achieve a more effective, accountable, open, and ethical federal government. Therefore, POGO has a keen interest in ensuring a proper balance in government between national security and other protections for our constitutional democracy. While we believe the government has a long way to go in order to strike the right balance, this hearing is a very welcome step in that direction.

Today I also am speaking as a member of the steering committee of the Make It Safe Coalition, a nonpartisan, trans-ideological network of organizations dedicated to strengthening protections for public and private sector whistleblowers. More than 400 groups have endorsed our efforts to strengthen whistleblower legislation, on behalf of millions of Americans.[1] Our coalition is deeply concerned with the current threats in the name of national security to civil service rights, whistleblower protections, and taxpayer accountability.

Indeed, national security claims threaten to engulf our government, and with cruel irony, make us less safe. In August of this year, a devastating court decision stripped federal employees in national security sensitive positions of their right to appeal an adverse personnel action—setting the stage to also strip due process rights for actions that are discriminatory or in retaliation for whistleblowing. The deeply flawed decision in *Kaplan v. Conyers, Northover and MSPB* (*Conyers*)[2] arms agencies with sweeping power not granted by the President or Congress. This affects untold numbers of civil servants, because the Office of Personnel Management (OPM) doesn't know how many national security sensitive positions there are. We only know from the government's brief in *Conyers* that there are at least half a million workers in positions labeled as

[1] Open letter from Project On Government Oversight et al., to President Barack Obama and Members of the 111th Congress, regarding strong and comprehensive whistleblower rights, September 23, 2011. www.makeitsafecampaign.org/wp-content/uploads/2013/11/WPA-Sign-On-Letter.pdf (Downloaded November 15, 2013)

[2] *Kaplan v. Conyers*, No. 2011-3207, (Fed. Cir. August 20, 2013). http://www.cafc.uscourts.gov/images/stories/opinions-orders/11-3207.opinion.8-19-2013.1.pdf (Downloaded November 14, 2013)

national security sensitive at the Department of Defense (DoD) alone.[3] There also has been a jaw-dropping lack of oversight of the seemingly arbitrary and overused designation of national security sensitive positions.

What is a National Security Sensitive Position?

The authority for designating positions as national security sensitive was created decades ago by Executive Order 10450 issued by President Eisenhower and is still in effect, as amended.[4] People who hold a national security sensitive position may or may not have access to classified information. Our concern here is with the latter, since that category of national security sensitive positions, called noncritical-sensitive, were at issue in *Conyers*.[5] Security clearance holders have long had different rights and procedures from other civil servants.[6] This Subcommittee and others have been delving into the many problems with security clearances in other hearings and legislation.

E.O. 10450 states:

> The head of any department or agency shall designate, or cause to be designated, any position within his department or agency the occupant of which could bring about, by virtue of the nature of the position, a material adverse effect on the national security as a sensitive position.[7]

While the head of an agency designates, the E.O. delegates the responsibility of determining the scope of national security sensitive positions to OPM. OPM's regulations define national security sensitive positions as:

> (1) Those positions that involve activities of the Government that are concerned with the protection of the nation from foreign aggression or espionage, including development of defense plans or policies, intelligence or counterintelligence activities, and related activities concerned with the preservation of the military strength of the United States; and
> (2) Positions that require regular use of, or access to, classified information. Procedures and guidance provided in OPM issuances apply.[8]

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[3] *Kaplan v. Conyers*, Initial Brief for Director, Office of Personnel Management, November 23, 2011, p. 4, n. 7. http://mspbwatch.files.wordpress.com/2012/08/berryv-conyers-initialbriefforopm.pdf (Downloaded November 14, 2013) (Hereinafter *Kaplan v. Conyers* Initial Brief for OPM Director)

[4] 5 U.S.C. § 7311("Loyalty and striking") http://www.gpo.gov/fdsys/pkg/USCODE-2011-title5/html/USCODE-2011-title5-partIII-subpartF-chap73-subchapII-sec7311.htm (Downloaded November 14, 2013) (Hereinafter 5 U.S.C. § 7311("Loyalty and striking"))

[5] National security positions are categorized as "noncritical-sensitive," "critical-sensitive," or "special-sensitive," based on the degree of harm that a person in the position could cause to national security. *Code of Federal Regulations*, Title 5, § 732.201(a). http://www.gpo.gov/fdsys/granule/CFR-2012-title5-vol2/CFR-2012-title5-vol2-sec732-201/content-detail.html (Downloaded November 14, 2013)

[6] *Department of the Navy v. Egan*, 484 U.S. 518 (1988). (Hereinafter *Department of the Navy v. Egan*)

[7] 5 U.S.C. § 7311("Loyalty and striking")

[8] 5 USC § 732.102(a) http://www.gpo.gov/fdsys/pkg/CFR-2012-title5-vol2/pdf/CFR-2012-title5-vol2-part732.pdf (Downloaded November 14, 2013)

However, OPM has failed to appropriately oversee the use of these designations by agencies. With no real checks and balances, the agencies have been applying the designation extremely broadly to include low-level positions with no real national security implications. In fact, for many years, federal agencies such as DoD and the Department of Homeland Security have been allowed to label virtually any position as national security sensitive. It is hard to grasp the scope of the proliferation of these positions, since again, OPM doesn't even know how many there are. This is especially troubling given that Executive Order 10450 gives OPM primary oversight and reporting responsibilities for agency national security sensitive designations. Yet, when POGO sent a Freedom of Information Act request for reports from the past 10 years on agency use of the designations—reports that are mandated by Section 14 of the E.O.—OPM said there were no responsive records.[9] So it seems that for years OPM has allowed the agencies unfettered discretion without conducting its oversight and reporting responsibilities.[10]

As the Government Accountability Project pointed out, giving agencies such broad discretion invites abuse:

> To illustrate the unreliability of these judgment calls, in a pending Whistleblower Protection Act case, *MacLean v. DHS* (Fed. Cir. No. 2011-3231), the agency contends that a whistleblower significantly undermined aviation security by exposing and successfully challenging government orders to eliminate all Air Marshal coverage for planes targeted by a confirmed, more ambitious 2003 rerun of 9/11. Those subjective judgment calls are not always credible, or even rational. An objective, tangible nexus is a prerequisite to respect constitutional restrictions on vague or overbroad restrictions of liberty.[11]

Indeed, the E.O.'s definition of personnel who may have "material adverse effect on the national security" must have objective, credible boundaries. Naturally, the vast majority of civilian positions that fit an acceptably narrow definition are held by security clearance holders with access to classified information. We also acknowledge a need for additional security screening for a very limited number of civilian positions with very specific national security responsibilities but no access to classified information.

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[9] "The Office of Personnel Management shall report to the National Security Council, at least semiannually, on the results of such study, shall recommend means to correct any such deficiencies or tendencies, and shall inform the National Security Council immediately of any deficiency which is deemed to be of major importance." Executive Order 10450, *Code of Federal Regulations*, Title 3. (1949-1953) http://www.archives.gov/federal-register/codification/executive-order/10450.html (Downloaded November 14, 2013) (Hereinafter Executive Order 10450)

[10] Letter from Angela Canterbury, Project On Government Oversight, to Trina Porter, U.S. Office of Personnel Management-FOIA Requester Service Center, about national security sensitive positions, July 1, 2013. http://www.pogo.org/our-work/letters/2013/pogos-foia-request-to-opm.html; Letter from Trina Porter, U.S. Office of Personnel Management-FOIA Requester Service Center, to Angela Canterbury, Project On Government Oversight, regarding a July 2, 2013, FOIA request, September 10, 2013. http://www.pogoarchives.org/m/ns/us_opm_20130910.pdf .

[11] Comments from Thomas Devine, Government Accountability Project, to Kimberly Holden, U.S. Office of Personnel Management, regarding Proposed Rule on Designation of National Security Positions in the Competitive Service, and Related Matters, June 27, 2013. http://www.whistleblower.org/storage/documents/comments_on_sensitive_jobs_rule.pdf (Downloaded November 14, 2013)

Even so, extensive background checks should never be a predicate for denying due process rights for discriminatory personnel actions. Quite the opposite—Congress gave civil service and whistleblower protections to this critical workforce because it did not want a corrupt spoils system and did want accountability for waste, fraud, and abuse. Sometimes the investigation process itself is used as a form of retaliation for whistleblowing. Workers in national security sensitive positions without security clearances had for years been able to challenge adverse personnel actions at the Merit Systems Protection Board (MSPB)—but not anymore.

An Activist Court Decision Strips Civil Service Rights and Whistleblower Protections from National Security Positions

In *Kaplan v. Conyers, Northover and MSPB*, the United States Court of Appeals for the Federal Circuit held that federal agencies have unlimited discretion to take adverse actions pertaining to the eligibility to occupy a national security position without review by the MSPB. This greatly expands the Supreme Court decision in *Department of the Navy v. Egan*, which for decades has only applied to security clearances.[12] *Conyers* effectively wipes out civil service due process rights and whistleblower protections for anyone in a national security sensitive position.

Now, if an agency fires a national security sensitive employee for having made a legally protected whistleblower disclosure or because of that employee's race or religion, the employee likely will not be able to seek justice from the Merit Systems Protection Board and will have no other recourse. While the Majority said in footnotes that the decision was based on DoD regulations and rules and is not based on WPA claims, there are few who believe those footnotes provide any safeguards for the otherwise sweeping decision.[13] It is only a matter of time before the precedent is applied to whistleblowers and federal employees outside of DoD. As was noted from the bench at oral argument, after the *Egan* decision removed due process review of security clearance actions, it was inevitable that Board review of whistleblower retaliation was canceled in *Hesse v. Department of State*.[14]

Because the decision is so broad, it flouts the congressional intent of the Civil Service Reform Act of 1978, as well as the Whistleblower Protection Act of 1989 and the recently passed and strongly bipartisan Whistleblower Protection Enhancement Act of 2012—reforms POGO and the Make It Safe Coalition fought for years to enact. *Conyers* guts the landmark 1978 law and sets the stage to render the WPEA unenforceable. This will significantly reduce accountability while significantly expanding the boundaries and power of the national security state—throwing waste, fraud, and abuse of power deep into the shadows.

Since 1883 the federal workforce has been protected from the tyranny of politics with crucial safeguards for a non-partisan, professional workforce based on merit. Civil service employees are public servants whose tenure does not depend on the results of the last election—these

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[12] *Department of the Navy v. Egan;* 484 U.S.C. 518 (1988)
[13] *Kaplan v. Conyers*. p. 4 fn.3, and pp.32-33 fn 16.
http://www.cafc.uscourts.gov/images/stories/opinions-orders/11-3207.opinion.8-19-2013.1.pdf (Downloaded November 14, 2013)
[14] *Hesse v. Department of State*, 217 F.3d 1372, 1377-80 (Fed. Cir. 2000). *cert. denied,*
http://scholar.google.com/scholar_case?case=16102872784414756878hl=en&as_sdt=6&as_vis=1&oi=scholarr (Downloaded November 15, 2013)

federal employees serve the taxpayers, not political agendas. If the recent IRS scandal teaches us anything, it is the importance of a federal workforce that takes no action that may in any way even be *perceived* to be motivated by partisanship. The very reason we have these protections from unjust termination is to ensure that our federal workforce is insulated from political interference, and that no federal employee ever feels compelled to act in a partisan manner for fear of being fired.

Likewise, the law protects federal workers from retaliation when they expose waste, fraud, abuse, and other wrongdoing. Congress recently strengthened the rights and procedures available to whistleblowers which, in turn, will make the government work better for the American people.[15] It is well-known that these guardians of the public trust and safety save countless lives and billions of taxpayer dollars. However, left unaddressed, *Conyers* could strip statutory protections for whistleblowers who make legal disclosures.

Circuit Judge Timothy B. Dyk in his dissent stated:

> [W]hile the majority purports to reserve the issue, the rights of these employees under Title VII and the Whistleblower Protection Act will be affected as well, as the Board has made clear that extending *Egan* would 'preclude Board and judicial review of alleged unlawful discrimination, whistleblower retaliation, and a whole host of other constitutional and statutory violations.[16]

The Special Counsel Carolyn Lerner, head of the independent agency charged with protecting federal whistleblowers, issued the following press statement following the *Conyers* decision:

> Having filed an amicus brief in this case, we are disappointed in the outcome. This decision poses a significant threat to whistleblower protections for hundreds of thousands of federal employees in sensitive positions and may chill civil servants from blowing the whistle. OSC looks forward to working with Congress to strengthen existing whistleblower protections for all civil servants, including employees in sensitive positions.[17]

This Subcommittee and other Members of Congress have also raised concerns about the decision. In September, Senator Charles Grassley wrote President Obama urging him to clarify *Conyers*:

> [F]ederal employees will be left in limbo, with no certainty about whether disclosing information about waste, fraud, and abuse will be protected or not. The chilling effect of

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[15] 112th U.S. Congress, "Whistleblower Protection Enhancement Act of 2012" (S. 743), Introduced April 6, 2011, by Senator Daniel Akaka. http://www.gpo.gov/fdsys/pkg/BILLS-112s743enr/pdf/BILLS-112s743enr.pdf (Downloaded November 14, 2013)

[16] *Kaplan v. Conyers*, p. 27.

[17] Statement of the Office of Special Counsel in response to ruling on *Kaplan v. Conyers*, August 21, 2013. http://www.osc.gov/documents/press/2013/pr13_06.pdf (Downloaded November 15, 2013)

> such uncertainty would be devastating and would certainly discourage whistleblowers from reporting wrongdoing.[18]

While we similarly encourage the President to clarify due process rights in the wake of *Conyers*, we think that administrative action will likely fall short of real protections for civil servants. Indeed, thus far, the Administration has failed on this front.

Why the Proposed Rule Does Not Rein In National Security Sensitive Designations

The executive branch has shown little interest in limiting national security designations or providing due process to those who hold such positions. In 2010, OPM finally renewed its oversight on national security sensitive positions and issued a proposed rule pursuant to its authority and responsibilities under E.O. 10450.[19] It is our understanding that what ensued was essentially a turf battle between OPM and the Director of National Intelligence (DNI), both of which claimed jurisdiction over the boundaries for these positions. OPM's 2010 proposed rule was never finalized.

Meanwhile, the Obama Administration brought the appeal that guts the review of personnel actions for national security sensitive positions. We were told that DoD won the debate with OPM and the Department of Justice (DOJ), and the government then petitioned the Federal Circuit for an appeal of the MSPB decisions in favor of Rhonda Conyers, a low-level accountant, and Devon Haughton Northover, a commissary stocker—neither of whom had a credible national security role. The government argued that the MSPB should not have review over their adverse personnel actions, even though Conyers and Northover did not have access to classified information, and absent adequate justifications for the national security sensitive designations for these civil servants.[20]

That appeal resulted in a decision in favor of the government in 2012. Constitutional law expert Lou Fisher wrote in *The National Law Journal*:

> On August 17, in *Berry v. Conyers*, the U.S. Court of Appeals for the Federal Circuit substantially broadened presidential power, minimized the judiciary's role in national security, largely ignored congressional policy for the civil service, and misread the Supreme Court's decision in *Department of the Navy v. Egan* (1988). As a result, hundreds of thousands of federal employees are now more vulnerable to arbitrary

[18] Letter from Senator Chuck Grassley to President Obama, regarding concerns about the implications of *Kaplan v. Conyers* for whistleblowers, September 3, 2013, p. 3. http://www.grassley.senate.gov/judiciary/upload/Whistleblowers-09-03-13-letter-to-WH-Kaplan-Berry-v-Conyers-protections.pdf (Downloaded November 14, 2013)

[19] "Designation of National Security Positions," Proposed Rule, 5 CFR Part 732 (December 14, 2010). http://www.gpo.gov/fdsys/pkg/FR-2010-12-14/pdf/2010-31373.pdf (Downloaded November 14, 2013)

[20] *Hereinafter Kaplan v. Conyers Initial Brief for OPM Director.*

> dismissals and downgrades, including employees who exercise their whistleblower rights to disclose agency waste and corruption.[21]

Conyers, Northover, and the MSPB then sought a rehearing of the appeal en banc at the Federal Circuit. The day after the Court agreed to an en banc review, President Obama issued a directive for OPM and DNI to conduct rulemaking on national security sensitive positions.[22] It likely signaled to the Court that "oversight" for these positions was well in hand.

However, the proposed OPM/DNI rule[23] actually does nothing to reassure us that the Obama Administration plans to rein in the practically unlimited discretion afforded to agencies to designate national security sensitive positions, improve the deficient oversight, or protect the critical rights for whistleblowers and the civil service mandated by Congress.

The proposed rule does not sufficiently implement the following mandate in E.O. 10450:

> WHEREAS the American tradition that all persons should receive fair, impartial, and equitable treatment at the hands of the Government requires that all persons seeking the privilege of employment or privileged to be employed in the departments and agencies of the Government be adjudged by mutually consistent and no less than minimum standards and procedures among the departments and agencies governing the employment and retention in employment of persons in the Federal service. [24]

That is why we are grateful, Chairman Tester and Ranking Member Portman, for this hearing and for your letter in September asking OPM and DNI to postpone the rulemaking on the designation of national security positions in the competitive service.[25]

We agree that to finalize this rulemaking at this time is ill-advised, and may have damaging consequences to our government's operations. Because the proposed rule was issued prior to *Conyers*, it does not address the decision or speak sufficiently to the subsequent stripping of due process and appeal rights for employees in these positions.

We also are deeply concerned that the proposed rule does nothing to rein in the almost unbridled power of agencies to designate virtually any civil service position as national security sensitive.

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[21] Louis Fisher, "Enlarging executive power: Federal Circuit ruling puts many federal employees at risk," *National Law Journal*, September 10, 2012, p. 47. http://www.loufisher.org/docs/ep/bercon.pdf (Downloaded November 14, 2013)

[22] Memorandum from President Barack Obama, Office of the President, regarding rulemaking concerning the standards for designating positions in the competitive service as national security sensitive and related matters, January 31, 2013. http://www.gpo.gov/fdsys/pkg/FR-2013-01-31/html/2013-02306.htm (Downloaded November 14, 2013)

[23] "Designation of National Security Positions in the Competitive Service, and Related Matters," Proposed Rule, 5 CFR Part 732 (May 28, 2013) http://www.gpo.gov/fdsys/pkg/FR-2013-05-28/html/2013-12556.htm (Downloaded November 14, 2013)

[24] Executive Order 10450

[25] Letter from Senator Jon Tester and Senator Rob Portman, to the Honorable James R. Clapper, Director of National Intelligence, and Elaine Kaplan, U.S. Office of Personnel Management, regarding the national security workforce, September 25, 2013. http://www.scribd.com/doc/171015145/Tester-and-Portman-s-Letter-Re-National-Security-Workforce (Downloaded November 14, 2013)

Given the already expansive use of these designations, we would hope that any rulemaking would limit their use. Instead, the proposed rule is poised to expand the use of the designation to overly broad categories of positions such as senior managers in undefined key programs and fact-finding positions.

We hope that this hearing will yield information that Congress needs and OPM and DNI ought to provide before proceeding with rulemaking on national security sensitive positions. POGO posed several questions to OPM and DNI in our comments on the proposed rule.[26] We think far more needs to be known about the scope and costs,[27] policy impacts, due process, and oversight of national security sensitive positions. What will it cost to reinvestigate all personnel based on the sweeping definition of the designation? Shouldn't we fix the security clearance process first? If the background investigation process for security clearances is broken, as the Government Accountability Office reports,[28] then it is broken for national security sensitive positions as well.[29]

Congress Must Act

We would welcome a directive from President Obama clarifying access to the MSPB for national security sensitive position holders; and for OPM and DNI to curb the expansive use of these designations. However, we believe that ultimately Congress must reassert the rights it previously provided.

There is a simple legislative fix that would reverse the harmful effects of the activist court decision and reaffirm the long-standing congressional mandate for due process rights for civil servants who do not have access to classified information.

Simply clarify that: An employee appealing an action arising from an eligibility determination for a position that does not require a security clearance or access to classified information may not be denied Merit Systems Protection Board review of the merits of the underlying eligibility determination.

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[26] Letter from Angela Canterbury, Project On Government Oversight, to the Honorable James R. Clapper, Director of National intelligence, and Elaine Kaplan, U.S. Office of Personnel Management, regarding Designation of National Security Positions in the Competitive Service, and Related Matters, June 27, 2013. http://www.pogo.org/our-work/letters/2013/pogo-submits-comments-opm-odni-designation-20130627.html

[27] U.S. Office of Personnel Management, "Investigations Reimbursable Billing Rates for Fiscal Year (FY) 2013," September 14, 2012. http://www.opm.gov/investigations/background-investigations/federal-investigations-notices/2012/fin12-07.pdf (Downloaded November 14, 2013)

[28] Testimony of Brenda S. Farrell, Government Accountability Office, "Personnel Security Clearances: Opportunities Exist to Improve Quality Throughout the Process," November 13, 2013. http://www.gao.gov/assets/660/658960.pdf (Downloaded November 14, 2013)

[29] Letter from Elaine Kaplan, U.S. Office of Personnel Management, to the Honorable William D. Spencer, regarding OPM advisory opinions, Mareh 31, 2010. http://www.mspb.gov/netsearch/viewdocs.aspx?docnumber=533263&version=534765&application=ACROBAT (Downloaded November 14, 2013).

Delegate Eleanor Holmes Norton (D-DC) has already introduced a bill with seven cosponsors that would do just that.[30] Delegate Holmes Norton stated in her Dear Colleague:

> Stripping employees whose work does not involve classified matters of the right of review of an agency decision that removes them from their job opens entirely new avenues for unreviewable, arbitrary action or retaliation by an agency head and, in addition, makes a mockery of whistleblower protections enacted in the 112th Congress. My bill would stop the use of "national security" to repeal a vital component of civil service protection and of due process.[31]

I urge you to champion this legislative reform.

Two American Governments

This hearing on the national security workforce is particularly timely given the range of issues raised by the disclosures of National Security Agency contractor Edward Snowden. Though this hearing is specifically addressing national security sensitive positions, I also urge the Subcommittee to consider the broader context of the growing national security state. In the wake of the Snowden disclosures, some in Congress have focused on stemming high-risk security clearances and unauthorized leaks of classified information. However, as you consider reforms in those and other areas, we caution you to also guard against overreactions that will make matters worse. Excessive secrecy undermines our democracy and threatens our national security by making it harder to protect our legitimate secrets. There must be more balance.

In spite of several achievements in open government, secrecy in the name of national security has escalated in the Obama Administration. Regarding openness, President Obama recently admitted, "There are a handful of issues, mostly around national security, where people have legitimate questions where they're still concerned about whether or not we have all the information we need."[32] We are indeed concerned, Mr. President. [33]

In addition to the ramifications of the *Conyers* decision, evidence for the growing national security state is disturbing: The number of people cleared for access to classified information reached a record high in 2012, soaring to more than 4.9 million.[34] The Associated Press did an

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[30] 113th U.S. Congress, "To amend chapter 77 of title 5, United States Code, to clarify certain due process rights of Federal employees serving in sensitive positions, and for other purposes," (H.R. 3278), Introduced October 8, 2013, by Delegate Eleanor Holmes Norton. http://www.gpo.gov/fdsys/pkg/BILLS-113hr3278ih/pdf/BILLS-113hr3278ih.pdf (Downloaded November 14, 2013)

[31] Dear Colleague letter from Representative Eleanor Holmes Norton, to House of Representative Democrats, regarding cosponsoring a bill to clarify certain due process rights of federal employees serving in sensitive positions, September 11, 2013.

[32] President Barack Obama, "President Obama Participates in a Fireside Hangout on Google+" YouTube video, 35:12, posted by "whitehouse," February 14, 2013. (Downloaded March 4, 2013)

[33] Testimony of Angela Canterbury, Director of Public Policy, Project On Government Oversight, before the House Committee on Oversight and Government Reform on "Transparency and Accountability," March 13, 2013. http://www.pogo.org/our-work/testimony/2013/testimony-angela-canterbury.html

[34] Office of the Director of National Intelligence, 2012 Report on Security Clearance Determinations, January 2013, p. 3.

analysis earlier this year and found agency use of national security exemptions to the Freedom of Information Act are increasing from 3,805 times in 2009 to 5,223 times in 2012.[35] According to OpenTheGovernment.org's Secrecy Report 2013, "since 9/11, the number of secrecy orders[36] in effect has continually climbed and the number of new secrecy orders per year has outstripped the number of orders rescinded."[37] The Public Interest Declassification Board reported that approximately 20 million four-drawer filing cabinets could be filled with the amount of classified data accumulated every 18 months by just one intelligence agency—it would take two million employees to manually review that information.[38] And, despite some progress on declassification, *Secrecy News* reported that "a December 2013 deadline set by President Obama himself (in 2009) for declassification and public release of the backlog of 25 year old historically valuable records will not be met."[39] When this much information is shielded from public scrutiny, our nation's true secrets are put needlessly at risk and we neglect the public's right to know.

Conclusion

It's time for Congress to be far less deferential to this Administration and others on claims of national security that undermine our liberties and cloak wrongdoing. Congress must assert its constitutional powers to restore the balance between the branches of government. You can begin by reining in the nearly unbridled power of the agencies to misuse national security labels and make whole swaths of our government hidden and unaccountable. If the disastrous *Conyers* decision is allowed to stand, countless whistleblowers will be silenced and the civil service will be in peril. The consequences for our nation are too great for inaction.

Thank you again for inviting me to testify today. POGO and the Make It Safe Coalition pledge to continue to work with you to fulfill the promise of a government that is truly open and accountable to the American people.

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http://www.dni.gov/files/documents/2012%20Report%20on%20Security%20Clearance%20Determinations%20Final.pdf (Downloaded November 14, 2013)

[35] Jack Gillum and Ted Bridis, "US Citing Security to Censor More Public Records," Associated Press, March 11, 2013. http://bigstory.ap.org/article/us-citing-security-censor-more-public-records (Downloaded November 14, 2013)

[36] These secrecy orders prevent the disclosure of inventions and technology based on a claim of a possible national security threat by a federal agency.

[37] OpenTheGovernment.org, *Secrecy Report 2013*, September 2013, p. 30. http://www.openthegovernment.org/sites/default/files/Secrecy Report 2013 Final.pdf (Downloaded November 14, 2013)

[38] Public Interest Declassification Board, *Transforming the Security Classification System*, November 2012, p. 17. http://www.archives.gov/declassification/pidb/recommendations/transforming-classification.pdf (Downloaded November 14, 2013)

[39] Federation of American Scientists Project on Government Secrecy, "DoD IG Report on Overclassification Misses the Mark," *Secrecy News*, October 24, 2013. http://www.fas.org/sgp/news/secrecy/2013/10/102413.html (Downloaded November 14, 2013)

NTEU
The National Treasury Employees Union

Statement of

Colleen M. Kelley, National President

National Treasury Employees Union

On

Safeguarding Our Nation's Secrets: Examining the National Security Workforce

Before the Subcommittee on the Efficiency and Effectiveness of Federal Programs and the Federal Workforce,

Senate Homeland Security and Governmental Affairs Committee

November 20, 2013

Chairman Tester and ranking Member Portman: Thank you for allowing me to provide NTEU's views on this important topic. As National President of the National Treasury Employees Union, I represent over 150,000 employees in 31 agencies across government. Many of my members are in positions deemed "sensitive" by their agencies, and we are greatly concerned about the process used to make that designation and by the recent court ruling that threatens any review of agency decisions concerning the eligibility of employees to occupy "sensitive" positions.

This past August, the U. S. Court of Appeals for the Federal Circuit released its decision in Kaplan v. Conyers. The Court ruled that the Merit Systems Protection Board (MSPB) could not engage in substantive review of Department of Defense (DoD) decisions concerning the eligibility of employees to occupy "sensitive" positions, even though the MSPB had been capably doing so for decades. While the decision was technically limited to DoD, its broad reasoning will almost certainly be extended to all agencies.

The executive branch already has unlimited discretion to designate positions as "sensitive". There is no monitoring or reporting of how agencies arrive at this decision and each agency can create its own guidelines. Indeed, there appears to be a great deal of inconsistency in how the determinations are made. In recent years, many agencies have designated huge numbers of employees as "sensitive". At Customs and Border Protection, for example, almost all of the roughly 24,000 bargaining unit positions have been designated as "noncritical-sensitive", but only a small fraction require security clearances.

By allowing agencies to take unreviewable adverse actions against occupants of "sensitive" positions on the basis of eligibility, the Conyers decision provides incentives for agencies to continue to expand the number of positions designated as "sensitive" and to use eligibility as the basis for adverse actions since neither is subject to review. Once an agency has designated an employee as "sensitive", it can then deem that employee ineligible for his or her job. It can be based on incomplete or faulty background information; it can be for reasons motivated by an employee's race, religion, or constitutionally protected speech; it can be for retaliatory reasons; it can be because the employee is a whistleblower – the decision by the agency of being ineligible for the job is not reviewable under Conyers.

The Civil Service Reform Act sets out narrow national security exemptions to the adverse action appeals processes included in the law. The court's decision in an earlier case (Egan) held that the MSPB could not review agency security clearance determinations. However, the positions at issue in Conyers do not involve security clearances or access to

classified information. The Conyers decision creates an exemption that swallows the rule, leaving hundreds of thousands of employees with little practical ability to ensure that adverse actions taken against them are legally appropriate. In essence, the Conyers decision allows the executive branch to ignore the Civil Service Reform Act. If the MSPB is not able to review eligibility determinations, agencies can remove, suspend, or demote any employee they deem "ineligible" without ever having to justify the basis for their determination.

NTEU believes Congress should address the impact of the Conyers decision, which will affect such a large segment of the federal workforce. NTEU supports a bill offered by Rep. Eleanor Holmes Norton in the House (HR 3278) that would amend chapter 77 of title 5 to clarify certain due process rights of federal employees serving in "sensitive" positions. It provides that an employee or applicant for employment who is appealing an action arising from an ineligibility determination may not be denied MSPB review of that determination if the position does not require a security clearance or access to classified information, and is otherwise appealable. We believe this is a sensible solution that balances national security and due process interests. Thank you for your attention to this important topic.

Post-Hearing Questions for the Record
Submitted to the Honorable BRIAN PRIOLETTI
Assistant Director
Special Security Directorate, National Counterintelligence Executive
Office of the Director of National Intelligence

From Senator Jon Tester

"Safeguarding Our Nation's Secrets: Examining the National Security Workforce"
November 20, 2013

- Regarding the current proposed rule, how many of the comments submitted by the public were incorporated into this revised rule? What was the general theme of these comments?

  Response: As required by the Administrative Procedure Act, the Office of Personnel Management (OPM) and the Office of the Director of National Intelligence (ODNI) are considering all relevant comments submitted on the proposed rule during the public comment period. Since this review is on-going, OPM and ODNI have not made any final determinations on changes to the proposed rule based on these public comments.

  Examples of comments include concerns about whether the revised rule would result in increased costs to agencies and taxpayers; whether the revised rule provides adequate time to reassess position designations; whether the revised rule expands the number of national security sensitive positions in the government; whether the revised rule provides sufficient protections to whistleblowers or adequate procedural rights; and whether the proposed rule affects bargaining unit coverage.

- The initial rule was published in December of 2010 - just one week prior to the MSPB review of the Conyers and Northover cases. Additionally, the President's directive in January of 2013 came the day after the MSPB agreed to review the Conyers and Northover cases. Has the timing or content of the rule been influenced in any way by the Conyers and Northover cases? Did OPM and ODNI not consider the possible impact the court ruling may have on non-critical sensitive designations?

  Response: The proposed rule was not influenced by the then pending Conyers and Northover MSPB reviews. The proposed rule is one of a number of initiatives OPM and ODNI have undertaken since 2008 to simplify and streamline the system of Federal Government investigative and adjudicative processes to make them more efficient and equitable. The current regulations governing the designation of national security sensitive positions are now over 20 years old and provide only general guidance to agencies. The newly proposed regulation is intended to clarify

the requirements, through additional detail and concrete examples, and provide procedures that agencies should follow when designating national security positions.

- In drafting the proposed rule, how much consideration was given to the number of positions that could ultimately be designated as "sensitive" to national security? You testified that the rule is "expected, in some agencies, to result in the re-designation of positions to lesser sensitivity levels or public trust designations." This implies your department has attempted to estimate how many non-critical sensitive positions currently exist in government, and could potentially be added if this rule is finalized. Please share the findings on which you based your conclusion.

  Response: The number of positions that may be re-designated was not a primary consideration when drafting the proposed rule. The intent of the regulation, in alignment with Executive Order 10450, is to ensure the accurate designation of positions the occupants of which could have a material adverse effect on the national security. More accurate position designations should reduce potential risks to national security—as individuals assigned to these positions will undergo the appropriate national security investigation—and improve consistency and reciprocity across the government. As a result of receiving more detailed guidance and concrete examples, agencies may re-designate positions as either national security sensitive, or nonsensitive public trust, based on the specific nature of the duties and responsibilities of the position. Similar position categories may vary based on a specific position's unique requirements.

  Currently, there are no requirements for agencies to report internal position designation data to OPM or ODNI in support of the Suitability and Security Executive Agents, respectively (outside the context of audits). As a result, data on the approximate number of sensitive or public trust positions within the Executive Branch is unavailable. The proposed rule allows for additional data collections to comply with process efficiency requirements.

- Federal agencies maintain responsibility for carrying out guidance provided by the new rule and designating positions. What measures or metrics are in place to monitor how agencies apply this guidance? How will you ensure the agencies will not inappropriately designate positions without a credible national security risk as sensitive?

  Response: Pursuant to IRTPA and EO 13467, the DNI has an oversight role that includes assessments of agency personnel security programs; including the designation of national security positions. The DNI as the Security Executive Agent, issued guidance in October 2013 directing agencies to review and validate each individual employee's or contractor's need for access to classified information and to debrief those who no longer require such access based on their position duties. As part of that guidance, ODNI requested each agency report the number of government employees and contractors requiring clearances (by level) and the number of individuals debriefed because it was found that they no longer required access. Agency reports are due to ODNI by January 31, 2014.

Additionally, agencies provide quarterly reports to ODNI which include metrics on various aspects of security clearance processing. This reporting includes metrics for positions requiring a security clearance. Metrics for public trust and non-sensitive positions fall under the purview of the Director, OPM as the Suitability Executive Agent. Upon publication and implementation of the new rule, the ODNI will consider new agency reporting requirements for position designations.
To ensure agencies appropriately designate positions, the ODNI will work with OPM, as appropriate, to ensure that position designation policy and procedures include implementation guidance, establish reporting requirements and metrics as appropriate, and update the automated Position Designation Tool (PDT). The updated PDT will incorporate the provisions of the final rule and will provide agencies with a standard mechanism to improve the accuracy of position designations for all federal civilian positions. Further ODNI's exercise of oversight under E.O. 13467 and OPM's conduct of inspections under E.O. 10450 will ensure a complementary and comprehensive approach to the review of position designation.

- It seems that the greatest potential expansion of designations is likely to be in positions at the lowest sensitivity designation of "non-critical sensitive." Theoretically, that could encompass nearly every federal employee. Yet the proposed rule provides agencies with few details or examples of these positions. Do you agree this leaves open the possibility for a significant expansion of these designations?

  Response: The proposed rule does not support an assumption that the position sensitivity designation of noncritical–sensitive could be applied to every Federal employee. As previously noted, the proposed regulation is not intended to increase or decrease the number of positions designated as national security sensitive, but to provide more specific guidance to agencies in order to enhance the efficiency, accuracy, and consistency with which agencies make position designations. This is then in turn expected to improve protection to national security by ensuring similarly situated individuals undergo the same level of investigation. Under current policy, each applicant or Federal employee undergoes an investigation that meets at least the minimum investigative standards outlined in Executive Order 10450. This is similar to and consistent with the background check required for a non-critical sensitive position under the 2012 Federal Investigative Standards.

- Are there any estimates of how many new investigations or reinvestigations will be required to implement in the guidance in the proposed rule? How does the process for investigating eligibility for a non-critical sensitive position differ from the process required for security clearances? What is the cost difference?

  Response: There are no estimates of the number of new investigations or reinvestigations that will be required under the proposed rule. The sensitivity level designation determines the type of background investigation required, with positions designated at a greater sensitivity level requiring a more extensive background investigation. The proposed rule addresses periodic reinvestigations to

better align the reinvestigation requirements for public trust and national security positions with existing requirements for security clearances. This will ensure that the same reinvestigation satisfies multiple requirements and prevents costly duplication of effort.

Under current policy, an individual selected to occupy a non-critical sensitive position, regardless of whether access to classified information is required, will be the subject of an Access National Agency Check with Inquiries (ANACI) background investigation. This is the same background investigation that would be conducted if the position responsibilities required access to classified information at the Secret level. The ANACI background investigation satisfies both requirements and there is no cost differential. Likewise the new investigative standards, once implemented, will provide the same level of investigation – a "Tier 3" investigation – regardless of whether the individual requires a Secret clearance, or is otherwise in a noncritical-sensitive position.

- Why did the proposed regulations include a requirement for a one-time reassessment of position designations, instead of a periodic review or validation as recommended by GAO?

Response: In a July 2012 report, *Security Clearances: Agencies Need Clearly Defined Policy for Determining Civilian Position Requirements* (GAO-12-800), GAO recognized that agencies need an effective process for determining whether civilian positions require a security clearance in order to safeguard classified data and manage costs. As a result of their review, GAO recommended that the DNI issue guidance to require executive branch agencies to periodically review and revise or validate the designation of their existing federal civilian positions.

The proposed rule was originally issued by OPM on December 14, 2010 and set forth requirements for agencies to conduct an assessment of each covered position using the standards in the regulation to determine whether changes in position sensitivity designations would be necessary within 24 months of the effective date of the final rule. The current proposed rule simply reissues the 2010 proposal under joint Security Executive Agent and Suitability Executive Agent authority with technical modifications and clarifications, and provides the public an opportunity to submit additional comments. ODNI recognizes that duties and responsibilities of federal civilian positions may be subject to change due to agency mission requirements or other emerging issues that will require an agency to re-evaluate the position sensitivity designation. ODNI concurs with GAO's recommendations and will work with OPM and other executive branch agencies to ensure that position designation policy and procedures include requirements for agencies to conduct periodic reviews of position designations.

- Given that recent events have shown there are still areas to improve in the security clearance process, how frequently does the Performance Accountability Council meet and what is the status of the reform efforts lead by the council? Are any of the council's

ongoing efforts directed toward addressing and improving the national security position designation process?

Response: The Performance Accountability Council (PAC) meets on an as-needed basis and is chaired by the Deputy Director for Management, OMB. The ODNI defers to OMB for additional comments on PAC efforts on security reform. Since 2008, the PAC has supported the Security Executive Agent and Suitability Executive Agent in the implementation of a range of reform initiatives.

The PAC's efforts have resulted in the timeliness goals established by the Intelligence Reform and Terrorism Prevention Act of 2004 being met since 2009, with current efforts focused on maintaining this success while establishing quality measures for background investigations. Enhancements in the use of information technology have made security clearance and suitability processes more efficient. An improved electronic questionnaire for National Security Positions is now available to most applicants, and investigators and/or adjudicators have increased access to electronic record repositories and electronically transmitted background investigations. In addition, automated national security adjudication business rules allow for automated determinations on favorable Secret investigations for many departments and agencies.

In December 2012 the PAC endorsed the revised Federal Investigative Standards (FIS), and for the first time established a fully aligned, five-tiered model for suitability and security investigations. Once fully implemented, the revised FIS will streamline and facilitate greater alignment of investigations for suitability for federal employment, eligibility for access to classified information, eligibility to perform sensitive position duties, and fitness to work on a contract. The PAC also endorsed National Training Standards for Suitability Adjudicators, National Security Adjudicators, and Background Investigators in August 2012. The implementation plans for these training standards will be completed in CY14, and once implemented, will improve uniformity in the conduct of background investigations and the adjudicative process.

The PAC has also supported Security Executive Agent and Suitability Executive Agent collaboration to establish a uniform and consistent system for position designation related to their respective areas of authority within the Executive Branch. A step in achieving this goal is the joint revision of 5 Code of Federal Regulations (CFR) Part 732, re-designated as Part 1400, and upon approval of the proposed rule, the updating of the Position Designation Tool that will assist departments and agencies in determining the appropriate designation of USG positions. The proposed rule was posted in the Federal Register, and OPM and ODNI are currently adjudicating the comments.

In October 2013, the President directed OMB to conduct a 120-day review of suitability and security clearance processes and contractor fitness determinations. The broad focus on national security risk will address policies and

processes for designating national security positions and determining eligibility for access to classified information or to hold a sensitive position.

Finally, Congress, in section 907(f) of Public Law 113-66, enacted on December 26, 2013, gave a new statutory role to the PAC, to convene a task force on improving federal investigative service providers' access to state and local records, including criminal history record information, and to report its findings to your Committee. ODNI is a statutory member of the task force and looks forward to engaging with our federal colleagues and state and local law enforcement personnel to improve records access.

UNITED STATES OFFICE OF PERSONNEL MANAGEMENT

Post-Hearing Questions for the Record
Submitted to TIM CURRY
Deputy Associate Director for Partnership and Labor Relations
Office of Personnel Management
From Senator Jon Tester
"Safeguarding Our Nation's Secrets: Examining the National Security Workforce"
November 20, 2013

1. **In 2012, you conducted an audit of DOD agency's use of your Position Designation Tool and found that DOD's assessment of position sensitivity levels differed from yours in 26 of 39 positions surveyed. Were the bulk of the positions surveyed non-critical sensitive, as opposed to critical or special-sensitive?**

Response: The bulk of the positions in question for the referenced audit were designated as non-critical sensitive vice public trust.

2. **You testified that the current proposed rule differs from the 2010 rule only in that it establishes joint authority with ODNI. In fact, you also deleted an entire section from the 2010 rule concerning the reemployment eligibility of former federal employees, which detailed procedures for re-integrating federal employees terminated for national security reasons back into the workforce. Can you explain this provision and tell us why it was deleted?**

Response: The current proposed rule recognizes that the Office of Personnel Management (OPM) and the Office of the Director of National Intelligence (ODNI) have overlapping authority regarding the matters covered by the proposed rule. The section you refer to is currently found at 5 CFR 732.401. This provision describes OPM's responsibility to make reemployment eligibility determinations under 5 U.S.C. 7312, 10 U.S.C. 1609(d), and section 7 of E.O. 10450, as amended. Its absence from the proposed rule published by OPM and ODNI is simply a recognition that the matters covered in § 732.401 are the responsibility of OPM, not ODNI. As noted in the supplementary information, OPM will separately reissue as a rule any changes to 5 CFR 732.401. In the interim, this provision remains in effect.

3. **How many of the comments submitted by the public were incorporated into this revised rule? What was the general theme of these comments?**

Response: As required by the Administrative Procedure Act, OPM and ODNI are considering all relevant comments submitted on the proposed rule during the public comment period. Since this review is on-going, OPM and ODNI have not made any final determinations on changes to the proposed rule based on these public comments.

Examples of comments include concerns about whether the revised rule would result in increased costs to agencies and taxpayers; whether the revised rule provides adequate time to reassess position designations; whether the revised rule expands the number of national security sensitive positions in the government; whether the revised rule provides sufficient protections to whistleblowers or adequate procedural rights; and whether the proposed rule affects bargaining unit coverage.

4. **You testified that the proposed rule is "one of a number of initiatives" to streamline the investigative and adjudicative processes that OPM and ODNI are working on. Do any of the other initiatives you are working on further clarify designation of noncritical-sensitive positions?**

Response: The final rule will provide the basis for a series of supporting initiatives that will further clarify designation for all positions. Once the rule is finalized, implementing guidance will be jointly issued, the position designation tool will be jointly modified and the position designation training programs will be updated.

5. **You stated that the proposed rule "was in no way related to the Conyers litigation." Yet a timeline of milestones in the rule's history, such as its December 2010 publication in the Federal Register and December 2012 listing in the Unified Agenda, closely correlate with milestones in the Conyers case, such as the December 2010 review by the MSPB and August 2012 federal court decision. Were there discussions within OPM about the possible impact the court ruling may have on non-critical sensitive designations, and if so, what was the substance of those discussions?**

Response: OPM had already determined, in advance of the notice of proposed rulemaking, that the litigation was unrelated to position designations under the regulations. On February 4, 2010, the Merit Systems Protection Board (MSPB) issued a formal request for an advisory opinion from OPM pursuant to 5 U.S.C. 1204(e)(1)(A), on the question of whether OPM's position designation regulations affected the appeal rights of the appellants. OPM replied for the record on March 21, 2010. In relevant part, our reply reads as follows:

> While OPM's regulations . . . address the procedures to be followed by agencies in rendering a decision based on an OPM investigation, they do not address the scope of the Board's review when an agency takes an adverse action against an employee . . . following an unfavorable security determination. Likewise, OPM's adverse action regulations . . . do not address any specific appellate procedure to be followed when an adverse action follows an agency's determination that an employee is ineligible to occupy a sensitive position. . . . In short, the resolution of the issue before the Board . . . cannot be determined by reference to OPM's regulations.

See http://www.mspb.gov/oralarguments/.

In proposing its revised regulations, OPM again emphasized that the regulations are unrelated to the scope of appeal rights available to appellants, stating that:

> Part 732 is not intended to provide an independent authority for agencies to take adverse actions when the retention of an employee is not consistent with the national security. Nor should part 732 be construed to require or encourage agencies to take adverse actions on national security grounds under 5 CFR part 752 when other grounds are sufficient. Nor, finally, does part 732 have any bearing on the Merit Systems Protection Board's appellate jurisdiction or the scope of the Board's appellate review of an adverse action.

See 75 Fed. Reg. 77783, 77786 (Dec. 14, 2010).

6. **Please summarize the arguments OPM made in its filings in the *Kaplan v. Conyers* case on behalf of removing Conyers and other noncritical-sensitive federal employees from the MSPB process.**

Response: Because the Justice Department represented OPM in this case, please refer to the May 6, 2013 Supplemental Brief filed in the *en banc* court proceeding, attached, which includes a summary of argument.

7. **How is OPM meeting its responsibilities of oversight and reporting mandated by Executive Order 10450 Section 14, which states: "the Office of Personnel Management, with the continuing advice and collaboration of representatives of such departments and agencies as the National Security Council may designate, shall make a continuing study of the manner in which this order is being implemented" and "report to the National Security Council, at least semiannually, on the results of such study."**

Response: With the evolutions to the executive branch national security structures, OPM has continued its competitive service oversight functions regarding agency compliance with 5 CFR 732 for National Security Positions and EO 10450. OPM has worked in partnership with the Security Policy Board, the succeeding Personnel Security Working Group, both under the National Security Council policy structures, and currently the Performance Accountability Council (PAC). We are currently conducting many appraisals in collaboration with ODNI as the Security Executive Agent in collaboration with the ODNI as the Security Executive Agent and the PAC, chaired by OMB. Any appraisal that surfaces major and continuing deficiencies would be reported to the National Security Council per EO 10450, as appropriate.

8. **How do you propose to protect employees in sensitive positions from prohibited personnel practices? How will you ensure these employees have adequate due process and appeal rights, in keeping with Merit System Principles?**

Response: Management must still adhere to the Merit System Principles in 5 USC § 2301 as well as refrain from committing Prohibited Personnel Practices outlined in 5 USC § 2302(b). Thus employees are still protected. OPM, in conducting merit system oversight under Civil Service Rule V, is required to report the results of evaluations to agency heads with instructions for corrective action and, if warranted, refer evidence to the Office of Special Counsel. Additionally, if an employee in a sensitive position appeals a covered personnel action to the MSPB, and the action was for any reason other than ineligibility for access to classified information or for employment in a national security position, the employee may raise, as an affirmative defense, that he or she was subjected to a prohibited personnel practice. OPM cannot speculate on how the Court would address the scope of the MSPB's authority to review a whistleblower reprisal defense, when the specific basis of the underlying personnel action is the employee's ineligibility to hold a national security sensitive position. As the Justice Department stated in its brief in *Conyers*, that question was not before the Court.

9. **Federal agencies maintain responsibility for carrying out guidance provided by the new rule and designating positions. What measures or metrics are in place to monitor how agencies apply this guidance? How will you ensure the agencies will not inappropriately designate positions without a credible national security risk as sensitive?**

As noted above, OPM has authority under Executive order 10450 to conduct a "continuing study" of "deficiencies in the department and agency security programs under this order," including deficiencies in agencies' determinations, under section 3 of the order, that positions in the competitive or excepted service should be designated as "sensitive." OPM will continue to monitor designations as part of our "continuing study" responsibilities, which we exercise through periodic inspections. Oversight methodology includes assessment of agency policy guidance, confirmation that persons making position designation determinations are properly trained, and assessment of position designation determination documentation. Separately the proposed rule imposes more specific procedural and reporting requirements for competitive service positions, consistent with OPM's jurisdiction under law and executive order for the examinations and investigations required for appointment in the competitive service. Our oversight of competitive service position designations will necessarily be more detailed consistent with our jurisdictional responsibilities. In addition, as the revision of the position designation regulation is a joint effort with the Office of the Director of National Intelligence (ODNI), a full understanding of the oversight of this function would benefit from ODNI input.

10. It seems that the greatest potential expansion of designations is likely to be in positions at the lowest sensitivity designation of "non-critical sensitive." Theoretically, that could encompass nearly every federal employee. Yet the proposed rule provides agencies with few details or examples of these positions. Do you agree this leaves open the possibility for a significant expansion of these designations?

Response: No, we do not agree that the examples we furnished open the possibility for a significant expansion of "non-critical sensitive" designations. As noted in my testimony, the proposed rule maintains the current standard under Executive Order 10450, originally published in 1953. The proposed rule is not implementing a new requirement. The proposed rule is not intended to increase or decrease the number of positions designated as national security sensitive, but is intended to provide more specific guidance to agencies to enhance the efficiency, accuracy, and consistency with which agencies make position designations. As noted by my ODNI colleague, Mr. Prioletti, the proposed rule is expected, in some agencies, to result in the re-designation of positions to lesser sensitivity levels or to nonsensitive public trust designations under 5 CFR Part 731 (Suitability). Conversely, there may be instances where a position may be re-designated to a higher sensitivity level.

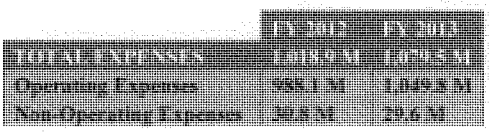
11. Are there any estimates of how many new investigations or reinvestigations will be required to implement the guidance in the proposed rule? How does the process for investigating eligibility for a national security sensitive position differ from the process required for security clearances? What is the cost difference?

Response: The prior regulation, 5 CFR 732.203, already required national security reinvestigations at least every 5 years for the occupants of critical-sensitive positions; and the existing regulations in 5 CFR 731.106 already required suitability reinvestigations at least every 5 years for those occupants of public trust positions who were also designated as noncritical-sensitive under section 731.106(c)(2). The guidance for reconciling public trust reinvestigations with national security reinvestigations will follow the proposed rule issuance. The process for investigating eligibility to be appointed or retained in a national security sensitive position is identical to the process required for adjudicating eligibility for access to classified information. There is no cost difference.

12. Why did the proposed regulations to include a requirement for a one-time reassessment of position designations, instead of a periodic review or validation as recommended by GAO?

Response: The purpose of the one-time reassignment is to provide the agencies an opportunity to review positions under the revised rules, determine whether or not they impact national security, and make any appropriate designation changes. While a periodic review is not explicitly stated in the proposed rule, this is an on-going responsibility by agencies and will be addressed in implementing guidance, as appropriate.

13. What were OPM's Federal Investigative Services total operating costs, and what was its background investigative workload for fiscal years 2012 and 2013?



[redacted]	[redacted]	[redacted]
Operating Expenses	988.1 M	1,049.8 M
Non-Operating Expenses	30.8 M	29.6 M

FIS Investigation Workload
Case Completed

Case Type	FY 2012	FY 2013
SSBI	93,776	97,611
SSBI-PR	58,381	55,492
Phased PR	67,279	74,307
BI Types	85,438	100,686
NACLC/ANACI	521,142	488,113
NACI	235,743	210,864
SAC	1,105,435	1,243,033
Other	100,211	124,238
Total	**2,267,405**	**2,394,344**

14. Given that recent events have shown there are still areas to improve in the security clearance process, how frequently does the Performance Accountability Council meet and what is the status of the reform efforts lead by the council? Are any of the council's ongoing efforts directed toward addressing and improving the national security position designation process?

Response: The Performance Accountability Council (PAC), chaired by OMB and supported by the Security Executive Agent (the DNI) and the Suitability Executive Agent (the Director of OPM), meets as needed to ensure appropriate process reform. Once the regulations governing position designation are finalized, the tools and guidance implementing the regulations will be developed by the Security and Suitability Executive Agents, under Performance Accountability Council (PAC) oversight to satisfy Security and Suitability Executive Agent responsibilities. Following the Navy Yard shootings, the President directed OMB, under PAC authorities, to conduct a comprehensive suitability and security clearance processes review. This review is being led by OMB, as the PAC chair, which established a senior review panel that meets twice weekly. A report detailing key findings and recommendations by the review team is scheduled to be delivered to the President at the end of February.

No. 2011-3207

IN THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

JOHN BERRY, Director, Office of Personnel Management,
Petitioner,

v.

RHONDA K. CONYERS and DEVON HAUGHTON NORTHOVER,
Respondents,

and
MERIT SYSTEMS PROTECTION BOARD,
Respondent.

Petition for Review of the Merits Systems Protection Board in
Consolidated Case Nos. CH0752090925-R-1 and AT0752100184-R-1

SUPPLEMENTAL BRIEF FOR THE ACTING DIRECTOR, OFFICE OF PERSONNEL MANAGEMENT, ON REHEARING *EN BANC*

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STATEMENT OF RELATED CASES

No other petition in or from the present actions has previously been before this or any other appellate court, and counsel is not aware of any related cases currently pending before this Court. A number of cases raising the issue presented in these cases are pending before the Merit Systems Protection Board. *See, e.g.*, *Brown v. Dep't of Defense*, CH-0752-10-0294-I-2 (initial decision Aug. 18, 2011); *Early v. Dep't of Defense*, CH-0752-11-0039-I-2 (initial decision Oct. 5, 2011); *Flores v. Dep't of Defense*, DA-0752-10-0743-I-3 (initial decision Jan. 13, 2012); *Hudson v. Dep't of Defense*, CH-0752-11-0682-I-1 (initial decision Feb. 14, 2012); *Ingram v. Dep't of Defense*, No. DC-0752-10-0264-I-4 (initial decision July 6, 2011); *Marshall v. Dep't of Defense*, CH-0752-10-0903-I-2 (initial decision Aug. 19, 2011); *Marshall v. Dep't of Defense*, CH-0752-10-0499-I-3 (initial decision Dec. 20, 2011); *Medley v. Dep't of Defense*, No. 0752-13-0167-I-1; *Woods v. Dep't of Defense*, CH-0752-11-0047-I-2 (initial decision May 20, 2011).

INTRODUCTION AND SUMMARY

Pursuant to this Court's order of January 24, 2013, the Acting Director of the Office of Personnel Management ("OPM")[1] respectfully submits this brief on rehearing *en banc*. This brief addresses the four questions the Court ordered the parties to answer in their supplemental briefs. ADD2-3.

1. The answer to the first question is that *Department of Navy v. Egan*, 484 U.S. 518 (1988), plainly forecloses review by the Merit Systems Protection Board ("Board") of the merits of a determination that an employee is ineligible for a national security sensitive position. The principles set forth in the Supreme Court's decision in *Egan*, which was made in the context of the determination that an employee is ineligible for a security clearance, apply with equal force to a determination that an employee is ineligible to occupy a national security sensitive position. The "constitutional investment of power" in the President that is discussed in *Egan* is the power of the President to protect our nation's borders, our interests abroad, and our nation's people from threats to our national security, and to manage the federal workforce to protect the interests of national security. *Egan*, 484 U.S. at 527. This constitutional authority is not limited to the protection of classified information, but includes controlling access to national security sensitive positions, defined in Executive Order

[1] John Berry is no longer the Director of OPM. Elaine Kaplan, Acting Director of OPM, should be substituted pursuant to Fed. R. App. P. 43(c).

10,450 as those in which an occupant "could bring about, by virtue of the nature of the position, a material adverse effect on the national security." E.O. 10,450, § 3 (Apr. 27, 1953), 18 Fed. Reg. 2489, 3 C.F.R. 936 (1949-1953), *reprinted as amended in* 5 U.S.C. § 7311. The eligibility determinations in these cases were made under E.O. 10,450, the same executive order at issue in *Egan*.

The panel majority correctly recognized that individuals in national security sensitive positions may produce equal, or indeed greater, harm to national security than persons provided security clearances. They may do so through acts or omissions unrelated to the disclosure of classified information, by allowing, for example, unauthorized and dangerous materials to cross our nation's borders, allowing contraband into correctional facilities housing terrorists, tampering with air traffic control systems, or interfering with large-scale military computer systems. ADD25-28 & n.18. Employees in national security sensitive positions are in a position to be able to cause such exceptional national harm by virtue of their particular roles in the federal workforce. And as the panel correctly noted, it is the Executive Branch that has the necessary expertise to make judgments about the risks inherent in such positions, whether or not those risks concern classified information. ADD22.

Respondents and amici err in urging that the government seeks to deprive employees in national security sensitive positions of their adverse action appeal rights and whistleblower protections. The government agrees that merit system principles

prohibiting discrimination, retaliation against whistleblowers, and other prohibited personnel practices always apply to individuals in national security sensitive positions. Employees in national security sensitive positions at covered agencies, who may or may not have a security clearance, receive full Board review of the underlying merits of adverse actions. It is only when an agency takes an action against an employee on the basis of its assessment of the national security risks presented by the employee's occupation of a national security sensitive position that Board review of the merits of the assessment is precluded. And even in those cases the employee is entitled to Board review of whether the employee received the procedural protections to which he or she was entitled.

It is, in fact, respondents who present a sweeping argument to this Court, arguing that Board review is available in all cases in which an agency removes an employee from a national security sensitive position that does not require eligibility for access to classified information, even where that determination is based entirely on predictive judgments and the weighing of security risks that arise out of matters or circumstances that do not in any respect involve employee misconduct. Thus, it is respondents' position that the Board may review the merits of an agency's conclusion to remove an employee from a national security sensitive position even where the employee has relatives or associates with ties to terrorist organizations, or where the employee has amassed large debts that make him or her susceptible to coercion. The

Board is simply poorly positioned to determine the extent to which such issues create unacceptable national security risks. For unlike the run of the mine adverse action case, the sole focus of a national security determination is on the probability of future behavior that could adversely affect national security.

Respondents' and amici's arguments amount, at base, to a quarrel with the Supreme Court's conclusion in *Egan* that the Board may not review the merits of an agency's national security determinations. Respondents and amici urge this Court to accept, with no evidentiary basis, that government agencies are conspiring to subvert Board review by designating positions as national security sensitive in order to, at some future date, remove employees at will. Not only does this argument hinge on a complete misunderstanding of how security determinations are made, it disregards the presumption of regularity that attaches to government action.

2. This Court's second question is answered by the fact that in *Egan*, the Supreme Court held that the Civil Service Reform Act ("CSRA") "by its terms does not confer broad authority on the Board to review a security-clearance determination,"484 U.S. at 530, and no congressional action before or after *Egan* calls into question that conclusion or its application in this case. Reliance on the 1990 Civil Service Due Process Amendments misconceives the government's argument. That Congress chose to make modifications regarding which employees are exempt from certain provisions of the CSRA has no bearing on the issue in this case because the

government has not argued that Mr. Northover and Ms. Conyers are exempt from the CSRA.

Respondents' reliance on the 2004 and 2008 National Defense Authorization Acts is similarly misplaced. The 2008 Act simply placed Department of Defense ("DoD") employees in the same position they were in 2004, at which time, just as today, *Egan* applied. Moreover, DoD's modified appeal procedures would have had no effect on determinations regarding eligibility for national security sensitive positions or whether the merits of such determinations could be reviewed by the Board. Nor do any of Congress's actions with respect to whistleblowing protections have any relevance under *Egan*. This case does not involve whistleblowing, and, as the Supreme Court made clear in *Egan*, when construing a statute, courts are reluctant to intrude on the President's exercise of foreign affairs and national security prerogatives unless Congress has "specifically" so provided. 484 U.S. at 530. Nothing in the 1990, 2004, 2008, and 2012 Acts cited by respondents and amici authorizes Board review of national security determinations.

3. With respect to the third question, Executive Branch determinations regarding eligibility for a security clearance and eligibility for a national security sensitive position are made using comparable standards and adjudicative guidelines. The predictive judgments required—which the Supreme Court held in *Egan* are not subject to Board veto—are identical. Agencies are directed to focus on susceptibility

to coercion, trustworthiness, loyalty, and reliability, and to conduct background investigations of an appropriate level. *See* E.O. 12,968, §§ 1.2(c)(1), 3.1(b), 60 Fed. Reg. 40245 (August 2, 1995), 3 C.F.R. 391 (1996); E.O. 10,450, §§ 3(a), 3(b), 8(a). In both cases, eligibility must be clearly consistent with national security, with all doubts resolved in favor of national security. E.O. 10,450, §§ 2, 3(a), 3(b), 8(a); E.O. 12,968, § 3.1. In DoD, the procedures used to make the determinations are the same, and the same team of individuals makes both types of determinations. If an individual is dissatisfied with a determination, the internal agency review procedures are the same as well.

4. The answer to the Court's final question, how the Board might handle an appeal from an agency determination that an individual is not eligible to hold a national security sensitive position, is that it cannot. First, the determination that an employee is not eligible to occupy a national security sensitive position is not an adverse action within the meaning of the applicable statute. Although the Board can review the adverse action that follows a negative eligibility determination, its review is limited to determining whether the position was, in fact, designated national security sensitive, and whether the individual was determined to be ineligible for his or her position.

Second, any Board review of the merits of a determination that an individual is ineligible for a national security sensitive position is incompatible with E.O. 10,450, in

which the President entrusted agencies with the responsibility to ensure that the employment and retention of employees is consistent with the interests of national security. In particular, Board review includes the authority to order reinstatement of an employee to a specific position, and to do so using a preponderance-of-the-evidence standard. This conflicts with the legal requirement that employment in a national security sensitive position be allowed only where clearly consistent with the interests of national security. If the Board exercises its own independent judgment and overturns an expert agency determination that an employee is ineligible for a national security sensitive position under its preponderance-of-the-evidence review and orders reinstatement of the employee to such a position, the agency's compliance with that order would violate E.O. 10,450. Nothing short of total deference to the merits of an agency's determination regarding eligibility for a national security sensitive position is consistent with *Egan*, E.O. 10,450, the text of the CSRA, and the nature of the determination at issue.

Deferential review by the Board of national security determinations by agencies would not resolve the matter. The Board is not qualified to evaluate questions of susceptibility to coercion, loyalty, and trustworthiness; only agency officials are qualified to make such determinations given their expertise, familiarity with the particular national security sensitive position, the intelligence available to them, and their experience in handling and evaluating information bearing on national security.

For this very reason, the Supreme Court in *Egan* did not narrow the Board's review of eligibility decisions; the Court precluded Board review of such determinations. The same result is required here.

For all of these reasons, and the reasons given in our briefs before the panel, the Board's decisions must be reversed.

STATEMENT OF JURISDICTION

This Court has jurisdiction over this petition for review pursuant to 5 U.S.C. § 7703(d). The Board issued its decisions on December 22, 2010, and dismissed the Director's timely requests for reconsideration on March 7, 2011. JA1; JA41; JA707-11.[2] The Director timely filed a petition for review on May 6, 2011. 5 U.S.C. § 7703(d); Fed. Cir. R. 47.9(a). On August 17, 2012, a panel of this Court, by a two-to-one vote, reversed the Board's decisions. On January 24, 2013, this Court granted respondents' petition for rehearing *en banc* and ordered this supplemental briefing on certain questions.

The Board's decision is final and appealable under the collateral order doctrine, as this Court held on August 17, 2011, when it granted the Director's petition. *See Berry v. Conyers*, Misc. No. 984, Order of August 17, 2011, JA879-82.[3]

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[2] "JA" refers to the joint appendix filed with the initial briefs.

[3] Respondents again argue that this Court was without jurisdiction to entertain the Director's petition for review. In its unanimous opinion granting the petition for review, a panel of this Court held that the Board's decisions were appealable under the

Continued on next page.

STATEMENT OF THE ISSUE

The question presented is whether the principles set forth by the Supreme Court in *Egan* prohibit the Board from overruling an agency's expert determination that an employee is ineligible to occupy a government employment position that is national security sensitive if the position does not also require eligibility for access to classified information.

STATEMENT

I. REVIEW PROCEDURES BEFORE THE MERIT SYSTEMS PROTECTION BOARD

A. When a federal agency takes an "adverse action" against an employee, that employee is entitled to the protections of 5 U.S.C. § 7513. An "adverse action" is defined by statute as "(1) a removal; (2) a suspension for more than 14 days; (3) a

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collateral order doctrine and that the Court thus had jurisdiction to hear the petition. JA 879-82 (Judges Bryson, Linn, and Prost). The panel that decided the merits of the case did not question that conclusion, neither the majority (Judges Wallach and Lourie) nor the dissent (Judge Dyk). That non-mutual collateral estoppel does not apply to the government, *see United States v. Mendoza*, 464 U.S. 154 (1984), does not advance the employees' argument. Employees' Brief ("Em.") 5. It is not necessary to prove that the government will be estopped in a future case from raising the arguments it raises here, in order to demonstrate application of the collateral order doctrine.

The Board also now asserts that under *Kloeckner v. Solis*, 133 S. Ct. 596 (2012), this Court does not have jurisdiction. Board xviii. But *Kloeckner*, which interpreted 5 U.S.C. § 7703(b), has no bearing on the Director's statutory authority to petition this Court for review, which is set forth in 5 U.S.C. § 7703(d). Although section 7703(b) contains a special provision dealing with the filing of discrimination cases, section 7703(d) contains no similar requirement.

reduction in grade; (4) a reduction in pay; and (5) a furlough of 30 days or less." 5 U.S.C. § 7512.

The protections afforded to an employee who is subject to an adverse action "include written notice of the specific reasons for the proposed action, an opportunity to respond to the charges, the requirement that the agency's action is taken to promote the efficiency of the service, and the right to review of the action by Board." *Romero v. Dep't of Defense*, 527 F.3d 1324, 1327 (Fed. Cir. 2008).

B. Upon an appeal by an aggrieved employee to challenge an adverse action, the Merit Systems Protection Board may sustain the agency's action only if the agency demonstrates that its decision is supported by a preponderance of the evidence. 5 U.S.C. § 7701(c)(1)(B). The Board may mitigate or reduce the agency's penalty based on what are known as "Douglas factors." *See Douglas v. Veterans Admin.*, 5 M.S.P.R. 280, 305 (1981) (considering, *e.g.*, "the employee's past disciplinary record" and the "consistency of the penalty with those imposed upon other employees for the same or similar offenses").

The OPM Director may petition for reconsideration by the Board of the Board's final decision when the Director determines that "the Board erred in interpreting a civil service law, rule, or regulation affecting personnel management and that the Board's decision will have a substantial impact on a civil service law, rule, regulation, or policy directive." 5 U.S.C. § 7703(d)(1). The OPM Director also may

obtain further review of a final Board decision by filing in the Federal Circuit a petition for judicial review "if the Director determines, in his discretion, that the Board erred in interpreting a civil service law, rule, or regulation affecting personnel management and that the Board's decision will have a substantial impact on a civil service law, rule, regulation, or policy directive." 5 U.S.C. § 7703(d)(2).

II. NATIONAL SECURITY SENSITIVE POSITIONS

A. 1. Pursuant to the President's constitutional obligation to ensure national security, he has directed in E.O. 10,450 that federal agency heads establish security programs to ensure that "the employment and retention . . . of any civilian officer or employee . . . is clearly consistent with the interests of the national security," and to designate positions as "sensitive" when "the occupant of [the position] could bring about, by virtue of the nature of the position, a material adverse effect on the national security." E.O. 10,450, §§ 2, 3(b). These positions are national security "sensitive" positions.

Some, but not all, employees who hold such national security sensitive positions under E.O. 10,450 require eligibility for access to classified information in order to perform their jobs. Authorization to access classified information requires a security clearance, and eligibility for a security clearance is determined by the agency

head or designated official.[4] E.O. 12,968 specifies that grants of security clearances must be "kept to the minimum required for the conduct of agency functions . . . based on a demonstrated, foreseeable need for access." E.O. 12,968, § 2.1(b); *see also id.* §§ 1.2(a), 1.2(c)(2), 3.1.[5]

Consistent with these principles, OPM's regulations implementing E.O. 10,450 define "national security [sensitive] position" to include not only those positions "that require regular use of, or access to, classified information," but also those positions "that involve activities of the Government that are concerned with the protection of the nation from foreign aggression or espionage, including development of defense plans or policies, intelligence or counterintelligence activities, and related activities concerned with the preservation of the military strength of the United States." 5 C.F.R. § 732.102(a).[6]

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[4] Department of Defense regulations define "security clearance" as "[a] determination that a person is eligible under the standards of this part for access to classified information." 32 C.F.R. § 154.3(t).

[5] Even employees who hold national security sensitive positions and are granted a security clearance are given actual access to classified information only if it is determined that they "need to know" the particular information at issue in each instance. E.O. 12,968, § 2.5; *see also id.* §§ 1.1(h), 1.2(a), 1.2(c)(2).

[6] OPM has proposed revised regulations, and on January 25, 2013, the President issued a memorandum: "Rulemaking Concerning the Standards for Designating Positions in the Competitive Service as National Security Sensitive and Related Matters." 78 Fed. Reg. 7253 (Jan. 31, 2013). The memorandum provides that "[t]he Director of National Intelligence and the Director of the Office of Personnel Management shall jointly propose the amended regulations contained in the Office of Personnel Management's notice of proposed rulemaking in 75 Fed. Reg. 77783

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DoD regulations provide guidance to DoD employees on DoD's program to implement executive orders 10,450 and 12,968. The DoD regulation specifies that "[c]ertain civilian positions within DoD entail duties of such a sensitive nature, including access to classified information, that the misconduct, malfeasance, or nonfeasance of an incumbent in any such position could result in an unacceptably adverse impact upon national security. These positions are referred to . . . as sensitive positions" 32 C.F.R. § 154.13(a).[7] DoD policy further provides that the designation of national security sensitive positions—regardless of whether they require eligibility for access to classified information—"is held to a minimum consistent with mission requirements." 32 C.F.R. § 154.13(d).

2. National security sensitive positions are sub-categorized as "noncritical-sensitive," "critical-sensitive," or "special-sensitive," based on the degree of harm that a person in the position could cause to national security. 5 C.F.R. § 732.201(a). Pursuant to OPM implementing guidance issued under 5 C.F.R. § 732.201(b), a "noncritical-sensitive" position is one in which the occupant has the potential to cause

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(December 14, 2010), with such modifications as are necessary to permit their joint publication." *Ibid.*

[7] DoD is currently in the process of amending its regulations setting forth the Department's policies for assignment to national security sensitive duties and access to classified information. *See* 76 Fed. Reg. 5729 (Feb. 2, 2011) (part 156 regulations). This process includes revising the Department's part 154 regulations, which codify in large part Department of Defense Regulation 5200.2R, "Personnel Security Program." *See id.* at 5729 ("The procedural guidance for the [Department of Defense] [personnel security program] is currently being updated.").

damage to national security up to the "significant or serious level." Position Designation of National Security and Public Trust Positions (2009 version), JA326. "Critical-sensitive" positions are those where the occupant of the position would have the potential to cause "exceptionally grave damage" to national security, and "special-sensitive" positions are those where the occupant of the position would have the potential to cause "inestimable" damage to national security. *Ibid.*

B.1. To occupy a national security sensitive position, an individual must undergo a background check to determine that the individual is not susceptible to coercion or influence, is loyal and trustworthy, and to ensure that employment of the individual is "clearly consistent with the interests of the national security," as required by E.O. 10,450, §§ 2, 3(a), 3(b) (requiring full field investigation to determine eligibility for national security sensitive positions); *id.* § 8(a). Significantly, these standards are materially the same as those that govern the determination whether an individual is eligible for a security clearance, which authorizes access to classified information. *See* E.O. 12,968, § 3.1.

2. DoD has four[8] "central adjudication facilities," which make national security determinations based on background checks that have been conducted by OPM.[9]

[8] At the beginning of this litigation, DoD had nine such facilities, as explained in our initial briefs. DoD has since consolidated the facilities.

[9] OPM is the single largest investigative service provider within the

Continued on next page.

DoD facilities make decisions on eligibility for security clearances and also decisions on eligibility to hold national security sensitive positions. *See Romero v. Dep't of Defense*, 658 F.3d 1372, 1374 (Fed. Cir. 2011); 32 C.F.R. §§ 154.41, 154.3(cc) (defining "[u]nfavorable personnel security determination" to include both denial of a security clearance for access to classified information and non-appointment to a national security sensitive position).

DoD's adjudication process "involves the effort to assess the probability of future behavior, which could have an effect adverse to the national security. . . . It is invariably a subjective determination, considering the past but necessarily anticipating the future." 32 C.F.R. § 154.40(b); *see also* DoD Directive 5200.2, § 3.5 (April 9, 1999) ("A determination of eligibility for access to classified information or assignment to sensitive duties is a discretionary security decision based on judgments by appropriately trained adjudicative personnel.").

C. Under E.O. 12,968, § 5.2, when a security clearance is denied or revoked, the agency at issue must generally provide the employee or applicant "as comprehensive and detailed a written explanation of the basis for that conclusion as

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Federal Government, including for employment in the competitive service, for the Department of Defense under section 906 of Public Law 108-136, 5 U.S.C. § 1101 note, and for security clearances generally under 50 U.S.C. § 435b(c)(1). Some agencies conduct their own background investigations for limited purposes, including the Department of Justice and Department of Homeland Security.

the national security interests of the United States and other applicable law permit."[10] The employee or applicant must also be given the opportunity to respond in writing and obtain counsel. The agency must provide for an appeal to "a high level panel, appointed by the agency head, which shall be comprised of at least three members, two of whom shall be selected from outside the security field." *Id.* § 5.2(a)(6).

DoD fully complies with these requirements and provides access to a high-level review panel for all employees occupying national security sensitive positions, regardless of whether the employee holds a security clearance. When a DoD adjudication facility makes an unfavorable national security determination—whether or not regarding a security clearance—the employee or applicant is given "[a] written statement of the reasons why the unfavorable administrative action is being taken. The statement shall be as comprehensive and detailed as the protection of sources afforded confidentiality under the provisions of the Privacy Act of 1974 (5 U.S.C. 552a) and national security permit." 32 C.F.R. § 154.56(b)(1). The employee is given an opportunity to respond in writing and may request a hearing before an administrative judge at the Defense Office of Hearing and Appeals, who makes a recommendation to the review panel. *See Romero*, 658 F.3d at 1375. The DoD's Personnel Security Program Regulation 5200.2-R (32 C.F.R. 154) provides for an on-

[10] Sections 5.2(d) and (e) provide exceptions to these procedures when an agency head determines that the procedures cannot be invoked in a manner consistent with the national security. E.O. 12,968, § 5.2(d)-(e).

the-record proceeding before an Administrative Judge of the Defense Office of Hearings and Appeals, which results in a verbatim transcript (Appendix 13 at AP13.1.3), and includes the opportunity to be represented by counsel or a personal representative (Appendix 13 at AP13.1.5.1) and to present or cross-examine witnesses. *See* Memorandum from the Under Secretary of Defense (Intelligence), Nov. 19, 2007. The employee or applicant may then appeal to the independent review panel constituted under E.O. 12,968, as described above. E.O. 12,968, § 5.2(a)(6). The decision of the panel is in writing. *Ibid.*

D. In *Department of Navy* v. *Egan*, 484 U.S. at 530, the Supreme Court held that the denial of a security clearance is not an "adverse action" that can be reviewed by the Board under the CSRA.

In that case, the respondent's job duties involved physical access to the interiors of nuclear submarines. *See Egan v. Dep't of Navy*, 28 M.S.P.R. 509, 512, 522 (1985) (describing Mr. Egan's position as "Laborer Leader"); *see also Dep't of Navy v. Egan*, Government's Reply Brief, at *1, *available at* 1987 WL 880379 (describing Mr. Egan's duties as including knowledge of the arrivals and departures of nuclear submarines); *Egan v. Dep't of Navy*, 802 F.2d 1563, 1576 n.5 (Fed. Cir. 1986) (Markey, C.J., dissenting). The Navy denied the respondent a security clearance that was necessary to his noncritical national security sensitive position, and the respondent was then removed from his position

The respondent sought Board review of his removal from his position, *Egan*, 484 U.S. at 521-22, but the Supreme Court concluded that the Board did not have "authority by statute to review the substance of an underlying decision to deny or revoke a security clearance in the course of reviewing an adverse [employment] action." *Id.* at 520, 530.

The Court made clear that the Board's review was limited to "determin[ing] . . . whether in fact clearance was denied, and whether transfer to a nonsensitive position was feasible." *Id.* at 530. The Court explained that "[n]othing in the [Civil Service Reform] Act directs or empowers the Board to go further." *Ibid.*

Although when this Court decided the case, it had applied a strong presumption favoring appellate review of agency decisions, *Egan*, 802 F.2d at 1569, the Supreme Court held that that presumption of review "is not without limit, and it runs aground when it encounters concerns of national security, as in this case, where the grant of security clearance to a particular employee, a sensitive and inherently discretionary judgment call, is committed by law to the appropriate agency of the Executive Branch." 484 U.S. at 527.

The *Egan* Court explained that the President has delegated his constitutional authority to protect national security to Executive Branch agency heads. *See* E.O. 10,450 (Apr. 27, 1953), 18 Fed. Reg. 2489; E.O. 10,865 (Feb. 20, 1960), 25 Fed. Reg. 1583, as amended by E.O. 10,909 (Jan. 17, 1961), 26 Fed. Reg. 508; E.O. 12,968

(August 2, 1995), 60 Fed. Reg. 40245; E.O. 13,467 (June 30, 2008), 73 Fed. Reg. 38103. And the Supreme Court recognized that an agency's decision whether to grant a security clearance entails a prediction as to whether an individual is likely to compromise classified information, and it held that "[p]redictive judgment of this kind must be made by those with the necessary expertise in protecting classified information." *Egan*, 484 U.S. at 529. The Court in *Egan* emphasized that:

> For reasons . . . too obvious to call for enlarged discussion . . . the protection of classified information must be committed to the broad discretion of the agency responsible, and this must include broad discretion to determine who may have access to it. Certainly, it is not reasonably possible for an outside nonexpert body to review the substance of such a judgment and to decide whether the agency should have been able to make the necessary affirmative prediction with confidence. Nor can such a body determine what constitutes an acceptable margin of error in assessing the potential risk.

Ibid. (internal quotation marks omitted).

This Court has thus recognized that, under *Egan*, "when an agency action is challenged under the provisions of chapter 75 of title 5, the Board may determine whether a security clearance was denied, whether the security clearance was a requirement of the appellant's position, and whether the procedures set forth in section 7513 were followed, but the Board may not examine the underlying merits of the security clearance determination." *Hesse v. Dep't of State*, 217 F.3d 1372, 1376 (Fed. Cir. 2000).

III. FACTS AND PRIOR PROCEEDINGS

A. Respondents Rhonda Conyers and Devon Northover were determined to be ineligible to occupy national security sensitive positions within DoD. Both were serving in national security sensitive positions, though neither position required a security clearance. JA376. Following on DoD's adverse eligibility determinations, they were indefinitely suspended (because no non-sensitive position was available) and demoted, respectively. ADD59, 94.

The two individuals challenged DoD's actions in separate proceedings, and DoD contended in both cases that *Egan* precluded review of the merits of the agency's determination that the particular respondent was not eligible to hold a national security sensitive position. After administrative judges issued conflicting decisions on this issue, the Board, in a split decision, held that *Egan* limits the Board's review of the merits of a security-based eligibility determination only in cases involving eligibility for security clearances. JA1; JA41.

The Board remanded the cases to the agency. Ms. Conyers's case has since been dismissed as moot after the government provided Ms. Conyers with back pay and other relief.[11] Mr. Northover's case was dismissed without prejudice to refiling

[11] That no ongoing dispute exists between Ms. Conyers and DoD does not render this petition for review moot, as the panel majority recognized, because OPM has sufficient ongoing interests to satisfy Article III. ADD11 n.5 (citing *Horner v. Merit Sys. Protection Bd.*, 815 F.2d 668, 671 (Fed. Cir. 1987)). Such an approach presents no

Continued on next page.

following this Court's resolution of the Director's petition for review. JA900-905; JA1821.

B. The Director OPM petitioned this Court for review under 5 U.S.C. § 7703(d), and the Court granted the petition, explaining that the decision is appealable under *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546 (1949). *See Berry v. Conyers*, Misc. No. 984, Order of August 17, 2011, JA881-82.

After full briefing and oral argument, this Court reversed the Board's decisions. The panel majority held that *Egan* "prohibits Board review of agency determinations concerning the eligibility of an employee to occupy a 'sensitive' position regardless of whether the position requires access to classified information." ADD7. The Court rejected respondents' argument that *Egan* is limited solely to cases involving security clearances, and ruled that "*Egan* cannot be so confined." ADD13. The panel held that the principles set forth in *Egan* "require that courts refrain from second-guessing Executive Branch agencies' national security determinations concerning eligibility of an individual to occupy a sensitive position, which may not necessarily involve access to classified information." ADD13-14.

Article III problems. *See Horner*, 815 F.2d at 671; *cf. Camreta v. Greene*, 131 S. Ct. 2020, 2029 (2011) (finding no Article III problem where officials who received qualified immunity for their actions appealed a constitutional ruling). The government petitioned for review of the *Conyers* decision only after the Board denied the government's motion to dismiss as moot. *See* JA 392-93.

The panel majority stated that Congress "has the power to guide and limit the Executive's application of its powers," but it found that the CSRA does not impose such limits or make reviewable the security-related judgments of the Executive Branch. ADD15. On the contrary, the panel explained, the Supreme Court established in *Egan* that "the CSRA did not confer broad authority to the Board in the national security context." *Ibid.* Moreover, the panel rejected respondents' argument that the existence of a pre-CSRA provision allowing for summary suspension and removal of employees based upon national security concerns, 5 U.S.C. § 7532,[12] demonstrates that applying *Egan* where the agency has taken action pursuant to other provisions of the CSRA would render section 7532 a nullity. ADD17-18. The majority further explained that the Supreme Court rejected a virtually identical argument in *Egan*, holding that "§ 7532 does not preempt § 7513 and that the two statutes stand separately and provide alternative routes for administrative action." ADD18 (citing *Egan*, 484 U.S. at 532).

The panel reasoned that E.O. 10,450 does not mention "classified information" but instead is concerned with whether the occupant of a position could have "a material adverse effect on the national security," and the panel described respondents'

[12] The statutory definition of "adverse action" set forth in section 7512 excludes from the definition any suspensions or removals that are made under section 7532, which is a special provision that allows the head of an agency to remove an employee when "he determines that removal is necessary or advisable in the interests of national security." 5 U.S.C. § 7532.

focus on eligibility for a security clearance as "misplaced" because "Government positions may require different types and levels of clearance, depending upon the sensitivity of the position sought." ADD23 & n.16. The panel also stated that "*Egan*'s core focus is on 'national security information,' not just 'classified information.'" ADD20. And, the panel explained, because E.O. 10,450 requires agencies to make a determination that an individual's eligibility to hold a national security sensitive position is "clearly consistent with the interest of national security," the Supreme Court's concerns in *Egan* that this standard "conflicts with the Board's preponderance of the evidence standard" apply equally here. ADD24 (internal quotations omitted).

Finally, the panel observed that it is "naive to assume that employees without direct access to already classified information cannot affect national security." ADD25. The panel concluded that "[d]efining the impact an individual may have on national security is the type of predictive judgment that must be made by those with necessary expertise," ADD27, and the Board "cannot review the merits of Executive Branch agencies' determinations concerning eligibility of an employee to occupy a sensitive position that implicates national security." ADD30-31.

Judge Dyk dissented, opining that the majority's decision "nullifies" the CSRA. ADD38. In his view, *Egan*'s holding is limited to the "*narrow*" question whether the Board had authority to review security clearance decisions. ADD53-54.

On January 24, 2013, this Court granted respondents' petition for rehearing en banc and vacated the panel's order.

ARGUMENT

I. THE *EGAN* RULING IS NOT CONFINED TO DETERMINATIONS THAT AN INDIVIDUAL IS INELIGIBLE FOR A SECURITY CLEARANCE, BUT APPLIES EQUALLY TO DETERMINATIONS THAT AN INDIVIDUAL IS INELIGIBLE FOR A NATIONAL SECURITY SENSITIVE POSITION BECAUSE OF NATIONAL SECURITY RISKS, SUCH THAT *EGAN* FORECLOSES BOARD REVIEW OF SUCH DETERMINATIONS UNDER CHAPTER 75.

A. *Egan* Is Grounded In The President's Constitutional Authority Over National Security, Which Includes The Authority To Determine Eligibility Not Only For Security Clearances But Also For National Security Sensitive Positions, Which Pose Comparable Risks Of Adverse Effects On National Security.

1. The Supreme Court in *Egan* expounded upon the constitutional authority over national security matters that flows from the President's role as the "Commander in Chief of the Army and Navy of the United States." U.S. Const. Art. II, § 2; *Egan*, 484 U.S. at 527. The Court explained that in recognition of this constitutional power "courts traditionally have been reluctant to intrude upon the authority of the Executive in military and national security affairs." *Egan*, 484 U.S. at 530.

This "constitutional investment of power" provides the President authority to protect our national security, including protecting our nation's borders, our interests abroad, and our nation's people from threats to national security. *Id.* at 527. The President has explained that the protection of national security is a consideration in federal employment and requires "that all persons privileged to be employed in the

departments and agencies of the Government, shall be reliable, trustworthy, of good conduct and character, and of complete and unswerving loyalty to the United States." E.O. 10,450.

That the national security determinations here fall within *Egan* is confirmed by the fact that determinations regarding eligibility for a security clearance and eligibility for a national security sensitive position are made using comparable standards and—at DoD—comparable adjudicative guidelines, and involve the same complex predictive judgments of whether a particular individual poses an unacceptable risk to national security. In both cases, the President has directed agencies to focus on susceptibility to coercion, trustworthiness, loyalty, and reliability, and to conduct background investigations of an appropriate level. *See* E.O. 12,968, §§ 1.2(c)(1), 3.1(b), 60 Fed. Reg. 40245 (August 2, 1995), 3 C.F.R. 391 (1996); E.O. 10,450, §§ 3(a), 3(b), 8(a). And, in both cases, the President has required that eligibility must be clearly consistent with national security, with all doubts resolved in favor of national security. E.O. 10,450, §§ 2, 3(a), 3(b); 8(a); E.O. 12,968, § 3.1. *See also* 32 C.F.R. § 154.42(b) & app. H (DoD regulations applying common adjudicative guidelines to eligibility for access to classified information and assignment to sensitive duties).

2. Employees who work in positions that are designated as national security sensitive are in positions where they can cause significant harm to national security, regardless of the fact that their positions do not require security clearances for access

to classified information. E.O. 10,450, § 3; 5 C.F.R. § 732.201. The fact that an employee need not access to classified information for a particular national security sensitive position does not mean that the employee in that position poses less risk to the interests of national security or less directly implicates the President's authority to protect national security than an employee authorized to access classified information. For example, employees in positions that protect military supply lines or prevent terrorists from entering the country may pose a more immediate and direct risk to national security than some employees who have security clearances. And the level of position designation is not necessarily tied to access to classified information, either. An employee who holds a "critical-sensitive" position may not have a security clearance, for example, while a "non-critical sensitive" position may require a security clearance.

The Board ruled broadly that it can review the merits of a determination that an employee is ineligible to occupy a sensitive national security position, whenever the determination results in an adverse action, provided that the employee does not require access to classified information or eligibility for such access. Such positions, the Board acknowledged, can include those involving "protection of the nation from foreign aggression or espionage" and the "development of defense plans or policies, intelligence or counterintelligence activities, and related activities concerned with the preservation of the military strength of the United States." ADD75-76 (quoting 5

C.F.R. § 732.102(a)(1)). The Board's assertion of authority here to review national security determinations thus extends to *all* national security sensitive employees, no matter the risk. The Board's narrow focus on access to classified information ignores that fact.

3. While the plaintiff in *Egan* contested a decision related to a security clearance, the reasoning of *Egan* was based on the President's ability to protect national security, not just his ability to protect classified information. The reasoning of *Egan* depended on the President's authority to protect national security, his delegation of that authority to Executive Branch agencies, and the fact that the kinds of predictive judgments required to determine which employees should be entrusted with national security responsibilities are inherently discretionary judgments that are left to the expertise of the agencies that employ them. Respondents' attempt to restrict the President's role in protecting national security to the ability to classify information is contrary to that *Egan* principle and should be rejected. *See, e.g.,* Employees' Brief ("Em.") 29-30 (suggesting that the President's ability to classify information is the only relevant means of protecting national security).

4. That *Egan* applies does not mean that employees who are granted security clearances or occupy national security sensitive positions are deprived of the protections provided in Chapter 75 of the CSRA. Just as the Supreme Court's

decision in *Egan* did not "swallow the rule of civil service law," Board 18, neither does the government's position in this case.

First, *Egan* did not eliminate the merit system principles. These merit system principles—which prohibit discrimination, retaliation against whistleblowers, and other prohibited personnel practices—apply to individuals in covered agencies regardless of whether they serve in national security sensitive positions. *See* 5 U.S.C. Chapter 23.

Second, employees in national security sensitive positions receive full Board review of adverse actions taken for any reason unrelated to eligibility to hold a national security sensitive position. The Board has reviewed such determinations involving employees in national security sensitive positions, and it will continue to do so under the government's position in these cases.

In other words, it is only when an agency takes an action against an employee on the basis of its assessment of the national security risks presented by the employee's occupation of a national security position that Board review of the merits is precluded. And it is only the agency's underlying determination to revoke or deny eligibility that may not be reviewed; as this Court has explained, the employee is still entitled to Board review of whether the position requires a clearance (and by analogy, whether it was, in fact, designated national security sensitive) and whether the procedures set forth in section 7513 were followed. *Robinson v. Dep't of Homeland Sec.*,

498 F.3d 1361, 1366 (Fed. Cir. 2007). Indeed, this Court has closely examined whether an agency has followed requisite procedures for reviewing national security determinations. *See Romero v. Dep't of Defense*, 527 F. 3d at 1329; *see also King v. Alston*, 75 F.3d 657 (Fed. Cir. 1996); *Cheney v. Dep't of Justice*, 479 F.3d 1343 (Fed. Cir. 2007).[13]

An agency's determination that an employee is ineligible for a national security sensitive position is not itself an "adverse action" subject to review under the CSRA. And that makes sense because adverse actions are limited to actions against an employee such as a reduction in pay, removal, extended suspension, reduction in grade, or furlough. 5 U.S.C. § 7512; *Egan*, 484 U.S. at 530. A determination that an employee is ineligible to occupy a national security sensitive position is not such an action in and of itself. Indeed, where an employee may be transferred to a non-sensitive position at the same grade and pay, such a determination may not even result in an adverse action.

In this sense, it is respondents' and amici's arguments in this Court that are sweeping: respondents propose that the Board may review an agency's assessment of the national security risks attendant to an individual's continued employment in a

[13] *Cf. Rattigan v. Holder*, 689 F.3d 764 (D.C. Cir. 2012). That decision does not conflict with the government's position in this case. The panel in that case confirmed that *Egan* extends beyond the mere revocation or denial of a security clearance and covers all "security clearance-related decisions made by trained Security Division personnel." *Id.* at 768. The security-related decisions that employees are ineligible to occupy national security sensitive positions are not subject to judicial review even under the majority's analysis in *Rattigan*.

national security position in every case. This would include, for example, decisions regarding employees at the Department of Homeland Security who are responsible for preventing the entry into the United States of organisms and other matter that could be used for biological warfare or terrorism, and preventing terrorists and terrorist weapons from entering the United States. It would also include, for example, Board review of DoD determinations of incligibility of employees who seek to work in nuclear or chemical areas, whose work includes driving trucks loaded with jet fuel or other extremely dangerous materials, contrary to the principles of *Egan*. And substantively it would apply, for example, to predictive judgments regarding the risks presented by an employee's association with relatives and others in foreign countries that may be hostile to the United States. *See, e.g., Hegab v. Long*, ___F.3d___ (4th Cir. April 25, 2013), *available at* 2013 WL 1767628 (dismissing case seeking review of agency's determination that plaintiff posed a security risk based on connections to foreign countries). It would also include determinations that, for example, indebtedness might render an employee subject to coercion. In many of these cases, unlike the run of the mine adverse action cases presented to the Board, the employee has engaged in no misconduct, but a security risk is nonetheless presented. The Board is simply not equipped to review the inherently discretionary predictive judgments underlying the assessment of whether these and other issues create national security risks in a given case.

B. *Egan* Forecloses Board Review Of Ineligibility Determinations For National Security Sensitive Positions And It Demonstrates That The Various Arguments Advanced By Respondents And Their *Amici* Are Meritless

1. Respondents' and amici's reliance on express exclusions from the CSRA and WPA is without force. The government is not attempting to "carve out an exception from the CSRA and Whistleblower Protection Act (WPA)." Office of Special Counsel ("OSC") 4. First, this case does not involve the WPA. Second, the exclusion of certain groups of employees from certain provisions of the CSRA demonstrates nothing with respect to Congress's intent for reviewability or not of determinations of eligibility to occupy national security sensitive positions, which is agency conduct not covered by those statutes. *See* National Treasury Employees Union ("NTEU") 14. Precisely the same argument could be made regarding employees with security clearances authorizing access to classified information, and yet the *Egan* Court held that the Board's review under the CSRA does not extend to review of the merits of a determination to revoke a security clearance.

2. The various other arguments advanced by respondents and amici in an effort to distinguish this case from *Egan* are largely identical to those made by respondent and amici in *Egan* and, at base, constitute a quarrel with *Egan* itself. They claim, for example, that there is a presumption of judicial review and that the CSRA does not provide an exception for national security determinations. But the Supreme

Court explained in *Egan* that the presumption of review "runs aground when it encounters concerns of national security." *Egan*, 484 U.S. at 527.

Relying on another argument expressly rejected in *Egan*, respondents assert that by enacting 5 U.S.C. § 7532, which allows for the summary suspension and removal of an employee from federal government employment when necessary for national security reasons, Congress intended that the Board review national security determinations made under provisions of law other than section 7532. These arguments were expressly rejected in *Egan*, and must be rejected here as well. *See Egan*, 484 U.S. at 527; *Id.* at 530; *compare id.* at 533, *with id.* at 535 (White, J., dissenting). The Court recognized that section 7532 provides an alternative means of removing an employee on national security grounds on a much more summary basis—for example, it provides for no process before suspension and no review outside of the procedures prescribed by the agency—but the Court held that the existence of this mechanism provided no basis for allowing review of Executive Branch national security determinations. As the Supreme Court described in *Carlucci v. Doe*, 488 U.S. 93, 102 (1988) (quoting *Cole v. Young*, 351 U.S. 536, 546 (1956)), section 7532 removal is appropriate only where "delay from invoking 'normal dismissal procedures' could 'cause serious damage to the national security.'" In other circumstances, an agency should proceed under section 7513. Moreover, the effect of suspension and removal under section 7532 is distinct from a denial of eligibility to occupy a national security

sensitive position. If an employee is removed under section 7532, he is removed entirely from the agency, and may not seek any future government employment without consultation with OPM. *See Egan*, 484 U.S. at 532; 5 U.S.C. § 7312. By contrast, under section 7513, an employee may be eligible for transfer to a nonsensitive position within the same agency or employment in another agency.

The Supreme Court in *Egan* was also unpersuaded by the argument that the Board should be able to review determinations regarding security clearances authorizing access to classified information because those determinations concern the kinds of facts and judgments that the Board has expertise in evaluating. *See* Brief of Amicus Curiae National Federation of Federal Employees, *Dep't of Navy v. Egan*, at *9, *available at* 1987 WL 880364; *see* Board 42-45. Yet, the Board in this case asserted that DoD's determinations here should be reviewable because they do not involve the merits of national security determinations in that they relate to evaluation of past conduct and financial difficulties. Board 19. That reasoning cannot be squared with *Egan*. The Navy's evaluation of Mr. Egan concerned his past criminal conduct and participation in an alcohol rehabilitation program, and the relevant E.O.s make no distinctions along the lines suggested by the Board. E.O. 12,968 directs the agency to consider an employee's "sound judgment, as well as freedom from conflicting allegiances and potential for coercion." E.O. 12,968, § 3.1(b); *see also* 32 C.F.R. § 147.8. E.O. 10,450, § 8(a)(1) directs an agency to consider "[a]ny behavior, activities, or

associations which tend to show that the individual is not reliable or trustworthy [and]. . . . [a]ny facts which furnish reason to believe that the individual may be subjected to coercion, influence, or pressure which may cause him to act contrary to the best interests of the national security." These last factors require an agency to make expert judgments that might in no way be tied to fault or wrongdoing by the employee. And DoD regulations specifically contemplate consideration of "[e]xcessive indebtedness, recurring financial difficulties, or unexplained affluence." 32 C.F.R. § 154.7(*l*). Financial irresponsibility can, in certain circumstances, indicate poor self-control, calling into question the employee's reliability and trustworthiness. Moreover, financial pressures, even without any fault on the part of the employee, may render that employee susceptible to coercion.

3. Amici and respondents criticize at length DoD's designations of the positions in this case as national security sensitive, but that issue is not before the Court. The parties *agree* that DoD has the authority to identify positions that are national security sensitive and that such identification is not subject to Board review. *See* Board 44 (citing *Skees v. Dep't of the Navy*, 864 F.2d 1576, 1578 (Fed. Cir. 1989), and agreeing that Board does not have jurisdiction to determine whether a position is properly designated as sensitive). DoD here identified the positions at issue in these cases as ones that create the potential for an adverse effect on national security and are thus deemed national security sensitive positions.

Respondents' and amici's reliance on *Cole v. Young*, 351 U.S. 536 (1956), similarly misses the mark. OSC 11-12; *see also* Government Accountability Project ("GAP") 22; Board 28. *Cole* concerned positions that were not "affected with the 'national security.'" *Cole*, 351 U.S. at 543. Positions designated as national security sensitive under E.O. 10,450 are, by definition, concerned with national security.

4. The number of employees in national security sensitive positions is not cause for a different result, and, in fact, illustrates the breadth of the Board's decision. The numbers cited by amici are also incomplete. The number of employees in national security sensitive positions quoted in OSC's brief is the total number of employees in such positions, including those who have a security clearance which makes them eligible for access to classified information. OSC 4; NTEU 12. DoD currently estimates that nearly 300,000 of DoD noncritical sensitive positions require security clearances, and there is no question of *Egan*'s applicability to these positions.

The President, through E.O. 10,450, has directed agencies to designate positions as national security sensitive when the occupant of the position could have a "material adverse effect on the national security." It should come as no surprise that DoD has a large number of employees who, by virtue of their particular employment positions at DoD, could have a material adverse effect on national security.

Respondents and amici contend that there may be over-designation of national security sensitive positions. The same claim could have been asserted with regard to

determinations regarding security clearances that the Supreme Court held in *Egan* were not subject to Board review.[14] In any event, agencies are not free to designate positions as national security sensitive on a whim. *See* Board 24. Agencies must follow the direction of E.O. 10,450 and guidance provided by agencies charged with issuing relevant regulations. 5 C.F.R. § 732.102(a); *see* note 6, *supra*. And, indeed, DoD guidance recognizes the principle that "the designation of sensitive positions is held to a minimum consistent with mission requirements." 32 C.F.R. § 154.13(d). In any event, any over-designation of specific positions as sensitive would not somehow make reviewable individualized, expert determinations about whether particular individuals are eligible to occupy national security sensitive positions. Respondents argue that Board review should be permitted in all cases to protect those individuals whose positions are overdesignated. But the converse argument is more compelling: permitting Board review for everyone would require Board review for individuals with obvious national security implications.

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[14] There is no reason to believe that there are greater over-designation concerns with respect to national security sensitive positions than with respect to security clearance determinations. *See* OSC 5-6. It is also no answer to state that the cost of required background investigations acts as a check on security clearances. OSC 25-26. OSC misunderstands the connection between national security sensitive positions and security clearances. The same investigation (and cost) applies for individuals in noncritical sensitive positions whether or not they possess secret level security clearances. *See, e.g.*, Investigations Reimbursable Billing Rates, *available at* http://www.opm.gov/investigations/background-investigations/federal-investigations-notices/2012/fin12-07.pdf.

Amici also ignore the "presumption of regularity" that attaches to an official's performance of his or her duties. *See Sickels v. Shinseki*, 643 F.3d 1362, 1366 (Fed. Cir. 2011). Indeed, amici turn this principle on its head, urging this Court to assume that agencies will attempt to avoid OSC or Board scrutiny "by designating positions as sensitive to insulate adverse actions from review." OSC 5; *see also* GAP 6; NTEU 10; Em. 22. These arguments, based purely on speculation, ignore the separation that exists between designation of positions as sensitive, determinations of whether specific individuals are eligible to occupy a sensitive position, and individual employment decisions. As explained, at DoD, agency officials make designation determinations, and four central adjudication facilities make national security determinations based on background checks. *See Romero*, 658 F.3d at 1373-74; 32 C.F.R. §§ 154.41, 154.3(cc). Under these circumstances, an individual supervisor is not in a position to use an eligibility determination as a means to be rid of a troublesome employee. *See also* GAP 26. Further, as noted above, employees in national security sensitive positions retain their full adverse action and other rights where the action proposed is based on misconduct or poor performance unrelated to national security concerns.

II. NO CONGRESSIONAL ACTION PRE OR POST-*EGAN* DEMONSTRATES THAT CONGRESS INTENDED BOARD REVIEW OF DETERMINATIONS THAT AN EMPLOYEE IS INELIGIBLE TO OCCUPY A NATIONAL SECURITY SENSITIVE POSITION.

In *Egan*, the Supreme Court explained that "[n]othing in the [CSRA] directs or empowers the Board" to go further than determining whether a position required a security clearance, whether clearance was denied, and whether a transfer was possible. 484 U.S. at 530. Critical to the Court's reasoning was its determination that Congress did not intend for review of national security determinations in the CSRA; the Court explained that it "consider[ed] generally the statute's express language along with the structure of the statutory scheme, its objectives, its legislative history, and the nature of the administrative action involved." *Ibid.* (quotations omitted). In doing so, the Supreme Court rejected the argument that the alternative found in section 7532 indicates that Board review of national security determinations is available under section 7513. *See* Em. 38-39. As demonstrated above, that reasoning depended on the national security basis for the determination, not on the fact of a security clearance authorizing access to classified information, as opposed to occupation of a national security sensitive position. As explained, such positions, by definition, have the potential to cause significant damage to national security. *See* E.O. 10,450, § 3(b).

In light of the Supreme Court's decision in *Egan*, nothing short of an express rejection by Congress of the Supreme Court's reasoning in *Egan* would lead to a

different analysis. Congress has not amended the CSRA to broaden the Board's review under section 7513, and Congress is presumed to be aware of the Supreme Court's interpretation of the CSRA in *Egan*. *See Gomez-Perez v. Potter*, 553 U.S. 474, 488 (2008). Respondents and amici thus err in relying upon statutes enacted post-*Egan* to argue that Congress has limited *Egan* to employees with security clearances.

A. Respondents' implication that Congress somehow limited *Egan* relies on a misunderstanding of the 2004 and 2008 National Defense Authorization Acts. Em. 40. The 2004 Act provided for a comprehensive overhaul of DoD's human resources system. As particularly relevant here, the 2004 Act provided that "[t]he Secretary . . . may establish an appeals process that provides employees of DoD organizational and functional units that are included in the National Security Personnel System ["NSPS"] fair treatment in any appeals that they bring in decisions relating to their employment." National Defense Authorization Act for Fiscal Year 2004, Pub. L. No. 108-136, § 1101(a), 117 Stat. 1392 (2003). The Act also provided for several other modifications to DoD's personnel system, including a pay for performance system and modifications to certain collective bargaining rights. *Id.*

DoD and OPM jointly promulgated regulations in November 2005 to implement the 2004 Act. With respect to the appeals process, as the D.C. Circuit described these regulations in *American Federation of Government Employees, AFL-CIO v. Gates*, 486 F.3d 1316, 1330 (D.C. Cir. 2007):

> [A]n employee first appeals an adverse employment decision to an administrative judge. After the administrative judge issues an initial decision, the losing party may appeal to designated DoD officials. See 5 C.F.R. § 9901.807(a), (g). After this appeal to the Department, further appeal may be taken to the independent Merit Systems Protection Board. *Id.* § 9901.807(h). Finally, the decision of the Merit Systems Protection Board is subject to judicial review in the courts. *Id.* § 9901.807(i).

See also DoD Human Resources Management and Labor Relations System, 70 Fed. Reg. 66,116, 66,119, 66,208 (Nov. 1, 2005) (§ 9901.807).

The dissenting judge on the panel in the instant case characterized that regulatory scheme as "a less draconian version of the agency authority asserted" here. ADD47. But that statement misunderstands the changes proposed in the NSPS. NSPS was designed to apply to all DoD employees, including the approximately three hundred thousand employees in non-sensitive positions. It was not designed to, and did not, affect the agency's determinations to grant security clearances or employment in national security sensitive positions. Those determinations continued to be made in the same manner; and both determinations were not subject to Board review before, during, or after the 2004 and 2008 Acts. The 2008 Act simply negated certain of the changes that the 2004 Act had authorized. Neither Act was concerned with the application of *Egan*.

That the short-lived National Security Personnel System also provided for special procedures for offenses that "'have a direct and substantial adverse impact on

[DoD's] national security mission,'" is not to the contrary. *See* Board 37. Those procedures applied to all employees and were not the equivalent of a determination to revoke a security clearance (which all parties agree is not subject to Board review under *Egan*) or eligibility for a national security sensitive position.

NSPS did more than add an additional layer of agency review in the employee appeals process; it fundamentally altered certain labor-management relations and pay structures. It was strongly opposed from its inception, and federal employee unions filed suit to challenge various regulations, focusing primarily on the changes to collective bargaining, but also objecting to the new appeals process. *See American Federation of Government Employees*, 486 F.3d at 1316. It is clear that Congress's concerns likewise focused primarily on collective bargaining. *See, e.g.*, H.R. Rep. No. 110-146, at 394 (May 11, 2007) ("The committee is concerned that the implementing regulations, issued in November, 2005, exceeded congressional intent, especially with respect to limitations on employee bargaining rights."); S. Rep. No. 110-77, at 11 (June 5, 2007) (Committee Overview: "Repealing the existing authority of DoD to establish a new labor relations system under the National Security Personnel System (NSPS). This would guarantee the rights of DOD employees to union representation in NSPS.").

The new appeals process was never implemented, and the National Defense Authorization Act of 2008, Pub. L. No. 110-181, § 1106(a) "amended 5 U.S.C. § 9902, retaining authority for performance-based pay and classification and compensation

flexibilities, but substantially modifying" other components of the law, including collective bargaining rights and appeal rights, which were returned to "Governmentwide rules." National Security Personnel System, 73 Fed. Reg. 56,344, 56,346 (Sept. 26, 2008). That Congress chose to repeal a never-implemented and unpopular overhaul to DoD's personnel system has no bearing on the issue in this case.

B. As an initial matter, this case does not involve the WPA or any allegations that employment actions were taken in response to whistleblower activities.[15] Respondents have not alleged that they engaged in any protected disclosures. Arguments regarding the WPA and the Whistleblower Protection Enhancement Act are thus misplaced.

OSC's reliance on Congress's actions with respect to the Transportation Security Administration ("TSA") in the Whistleblower Protection Enhancement Act ("WPEA"), Pub. L. No. 112–199, 126 Stat. 1465 (2012), is also misplaced. OSC 17-19. OSC argues that expansion of whistleblower protection to TSA employees is

[15] The WPA prohibits taking a "personnel action" with respect to an employee because of a protected disclosure. 5 U.S.C. § 2302(b)(8). The Act defines a "personnel action" to include any "adverse action" under 5 U.S.C. § 7512, and, in addition, various other employment actions. 5 U.S.C. § 2302(a)(2)(A). This Court has not had the occasion to address whether this definition includes a determination regarding an employee's eligibility for a national security sensitive position (an issue not presented in this case), although it has ruled that it does not include the revocation of a security clearance. *See Hesse v. Dep't of State*, 217 F.3d 1372, 1376 (Fed. Cir. 2000).

evidence of Congress's intent to extend Board jurisdiction over employees in national security sensitive positions generally, and in the context of determinations to occupy national security sensitive positions in particular. Although TSA employees may hold national security sensitive positions, holding a national security sensitive position does not exempt one from the WPA. If an employee is removed for misconduct or poor performance, for example, and the employee is covered by the relevant provisions of the CSRA, the Board may review that adverse action. And even if this Court were ultimately to rule that *Egan* precludes WPA review of ineligibility determinations (an issue not presented here) the Board would still be able to review any other personnel action alleged to be retaliatory;[16] review of the merits would be precluded only where the determination was based on a judgment regarding national security risks.

Moreover, as OSC explains in its brief, in enacting the WPEA, Congress sought to remedy what it viewed as an improper narrowing of the definition of "'the type of disclosure that qualifies for whistleblower protection.'" OSC 17. That specific purpose concerning the definition of protected disclosures does not support OSC's sweeping assertion that Congress also intended to thereby grant the Board review of agency determinations of employee ineligibility for national security sensitive positions.

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[16] The DoD Inspector General maintains a program to provide whistleblower protections. *See* DoD Directive 5106.01, § 5(s).

III. THERE ARE NO RELEVANT DIFFERENCES BETWEEN THE CRITERIA FOR DETERMINING ELIGIBILITY FOR A SECURITY CLEARANCE AND THE CRITERIA FOR DETERMINING ELIGIBILITY TO HOLD A NATIONAL SECURITY SENSITIVE POSITION.

The determination that an employee is eligible for a security clearance and the determination that an employee is eligible to hold a national security sensitive position are materially identical. The predictive judgments required—which the Supreme Court held in *Egan* are not subject to Board review—are identical. Agencies are directed to focus on susceptibility to coercion, loyalty, trustworthiness, and reliability, and to conduct background investigations of an appropriate level. *See* E.O. 12,968, §§ 1.2(c)(1), 3.1(b); E.O. 10,450, §§ 3(a), 3(b), 8(a). Under E.O. 10,450—the executive order at issue both in *Egan* and in this appeal—agencies must ensure that federal employment is "clearly consistent with the interests of the national security." E.O. 10,450, § 2. Likewise, under E.O. 12,968, issued after the *Egan* decision, security clearances "shall be granted only where facts and circumstances indicate access to classified information is clearly consistent with the national security interests of the United States, and any doubt shall be resolved in favor of the national security." E.O. 12,968, § 3.1(b); *see also id.* § 7.2(c) (reaffirming E.O. 10,450).

As further evidence that the nature of these decisions is the same, the President, in E.O. 13,467 (June 30, 2008), created a "Security Executive Agent" (the Director of National Intelligence) whose duties include "the oversight of

investigations and determinations of eligibility for access to classified information or eligibility to hold a sensitive position made by any agency; . . . developing uniform and consistent policies and procedures to ensure the effective, efficient, and timely completion of investigations and adjudications relating to determinations of eligibility for access to classified information or eligibility to hold a sensitive position." E.O. 13,467, § 2.3(c).

OPM regulations also recognize the symmetry of these national security determinations. For example, 5 C.F.R. § 732.301 requires that an agency provide certain minimum procedures when it makes either a "placement or clearance decision." And, as OPM has explained, the same form, the SF-86, is used for investigations of national security sensitive positions regardless of whether the employee has access to classified information. *See* JA290.

Similarly, DoD treats its national security determinations consistently, whether involving eligibility for security clearances or national security sensitive positions. DoD has four central adjudication facilities, which make national security determinations based on background checks. The facilities—indeed, the same individuals—make both decisions determining eligibility for security clearances and national security sensitive positions. *See Romero*, 658 F.3d at 1373-74; 32 C.F.R. §§ 154.41, 154.3(cc) (defining "[u]nfavorable personnel security determination" to include both access to classified information and appointment to a national security

sensitive position). In DoD, the determination of eligibility for a national security sensitive position is made by the same decisionmakers making the same type of judgment based on the same factors as determinations regarding eligibility for security clearances. *See Egan*, 484 U.S. at 529.

DoD also provides the same procedures to employees who receive unfavorable security personnel determinations, whether they hold a security clearance or not. When an adjudication facility makes an unfavorable national security determination, the employee or applicant is given "[a] written statement of the reasons why the unfavorable administrative action is being taken. The statement shall be as comprehensive and detailed as . . . national security permit[s]." 32 C.F.R. § 154.56(b)(1). The employee is given an opportunity to respond in writing and may request a hearing before an administrative judge at the Defense Office of Hearing and Appeals, who makes a recommendation to the review panel. *See Romero*, 658 F.3d at 1375. The DoD's Personnel Security Program Regulation 5200.2-R (32 C.F.R. 154) provides for an on-the-record proceeding before an Administrative Judge of the Defense Office of Hearings and Appeals, which results in a verbatim transcript (Appendix 13 at AP13.1.3), and includes the opportunity to be represented by counsel or a personal representative (Appendix 13 at AP13.1.5.1) and to present or cross-examine witnesses. *See* Memorandum from the Under Secretary of Defense (Intelligence), Nov. 19, 2007. The employee or applicant may then appeal to the

independent review panel constituted under E.O. 12,968, as described above. E.O. 12,968, § 5.2(a)(6). The decision of the panel is in writing. *Ibid.*

OSC and the Board make much of the fact that E.O. 12,968 and its procedural protections apply only to determinations regarding access to classified information. OSC 26; Board 42. But that does not mean that those same protections, or better, do not apply to determinations regarding national security sensitive positions. DoD, which employs the majority of individuals in national security sensitive positions who do not also have security clearances, has the identical protections for determinations of ineligibility to occupy national security sensitive positions, as it does for security clearances. 32 C.F.R. § 154.56.[17]

OSC further relies on a recent Presidential Policy Directive 19 (Oct. 10, 2012) that provides certain procedures for employees who assert that an agency denied or revoked their security clearance in retaliation for protected whistleblowing, to argue

[17] Amicus GAP's claim that the Department of Justice does not apply the same internal procedures for review of ineligibility determinations to occupy national security sensitive positions misconceives the facts in *Doe v. Department of Justice*. GAP 23. In that case, the employee was required to maintain eligibility for a security clearance, even though he did not have current access to classified information. The Board rejected a distinction between a situation in which an employee must maintain eligibility for access to classified information and a situation in which an employee has the agency's permission to actually access classified information. *See* 2012 M.S.P.B. 95 (Aug. 9, 2012), ¶ 20 (pending before this Court in No. 2012-3204). The case is not relevant to the question of what procedures apply when an employee is found ineligible to occupy a national security sensitive position.

that a distinction exists between eligibility determinations for national security sensitive positions and for security clearances. OSC 26-28. As OSC describes, prior to amendment, the WPEA contained language that would have allowed an appeal of an allegedly retaliatory revocation of a security clearance to an executive agency board. *See* OSC 20. Congress removed that language before passing the Act, and the President thereafter responded with the Presidential Policy Directive. That the President responded to a particular area of concern that came to his attention—and legislation that dealt specifically with security clearance determinations and not national security sensitive positions more broadly—provides no basis to speculate about procedures he deems appropriate for national security sensitive positions.

Moreover, the Presidential Policy Directive affected the rights of employees of certain intelligence components, who are excluded from the WPA, *see* 5 U.S.C. § 2302(a)(2)(C)(iii); Directive F(3). It thus has no effect on employees who work in components covered by the WPA, including the employees in these cases. And the Directive does not provide for third party review by an inexpert adjudicator like the Board or for judicial review, but rather establishes an internal board of experts drawn from the intelligence community to review claims by intelligence community personnel.

IV. THE BOARD IS NOT WELL POSITIONED TO SECOND-GUESS THE PREDICTIVE JUDGMENTS THAT UNDERLIE AGENCY INELIGIBILITY DETERMINATIONS.

A. Board review of the merits of a determination that an individual is not eligible for a national security sensitive position is simply incompatible with E.O. 10,450. Under E.O. 10,450, an individual may be employed in a national security sensitive position only when an agency can make an affirmative prediction that doing so is clearly consistent with national security. As the Court held in *Egan*, a "[p]redictive judgment of this kind must be made by those with the necessary expertise." *Egan*, 484 U.S. at 529. These types of determinations are "committed to the broad discretion of the agency responsible." *Ibid.* In particular, agency officials must determine the acceptable margin for error in a given case to determine whether an individual is eligible to occupy a national security sensitive position. *Ibid.* ("Nor can such a body determine what constitutes an acceptable margin of error in assessing the potential risk.").

Under the Board's decision, the Board will be called upon to evaluate the whole realm of agency personnel decisions related to national security. In these cases, for example, DoD exercised its predictive judgment about whether respondents would pose a risk to national security, *Egan*, 484 U.S. at 528-29, and concluded it had concerns with respect to the employees' unpaid debts and financial irresponsibility. Such irresponsibility can indicate poor self-control, calling into question the

employee's reliability and trustworthiness, or can point to financial pressures that might make the employee susceptible to coercion, absent any fault on the part of the employee. *See* JA122; JA159; *see also* DoD 5200.2-R, §§ C2.1, C2.2, C2.2.1.12. But that is merely one kind of security concern an agency may have regarding an employee. Agencies consider a host of factors in determining whether an individual's employment in a national security sensitive position is clearly consistent with national security. *See Egan*, 484 U.S. at 527 (describing this "sensitive and inherently discretionary judgment call").

An agency might, for example, have reason to question an employee's ties to a foreign country and whether those connections indicate "that the individual may be subjected to coercion, influence, or pressure which may cause him to act contrary to the best interests of the national security." *See* E.O. 10,450, § 8(a)(1)(v). The agency's analysis might consider the duration and intimacy of the relationships in question, the political condition of the foreign country, and the particular national security vulnerabilities of the national security sensitive position, among other things. These concerns have no connection to fault or misconduct. A national security analysis thus presents unique considerations that are not amenable to resolution through a suitability determination or a conduct-based adverse action.

The Board, as an outside non-expert body, is in no position to "determine what constitutes an acceptable margin of error in assessing the potential risk" to national

security posed by the employee. *Egan*, 484 U.S. at 529. In attempting to do so, the Board will be required to weigh the employee's and agency's competing assertions of the requirements of national security, and, as the Board recognized in its decision in *Egan*, "[i]f the Board were to exercise complete review over the underlying security clearance determination, it would inevitably be faced with agency exposition of highly sensitive materials and Board determinations on matters of national security." *Egan v. Dep't of Navy*, 28 M.S.P.R. 509, 518 (1985). The Board has not explained how it could protect the Executive's national security interests during its proposed broad and far-reaching review. Respondents contend that the government may fully protect its interests by seeking to seal the record in Board cases. Em. 50; *see also* OSC 29. But the harm from Board review is not limited to disclosure of national security information, and the same argument would, of course, apply to decisions to revoke or deny security clearances for access to classified information.

Moreover, preponderance of the evidence review is fundamentally incompatible with an agency's affirmative prediction that an individual's employment is not "clearly consistent with the interests of the national security." E.O. 10,450. Indeed, the Supreme Court has recognized this inherent incompatibility: "It is difficult to see how the Board would be able to review security-clearance determinations under a preponderance of the evidence standard without departing from the 'clearly consistent with the interests of the national security' test. The clearly consistent

standard indicates that security-clearance determinations should err, if they must, on the side of denials." *Egan*, 484 U.S. at 531. The Court went on to explain that "[p]lacing the burden on the Government to support the denial by a preponderance of the evidence would inevitably shift this emphasis and involve the Board in second-guessing the agency's national security determinations." *Ibid.* Thus, the Court recognized that it was "extremely unlikely that Congress intended such a result when it passed the Act and created the Board." *Egan*, 484 U.S. at 531-32.

Indeed, the Board's proposed review would apply preponderance-of-the-evidence review to the whole field of agency determinations, including for example, a judgment that an employee's relatives in foreign countries may create divided loyalties and make employment in particular national security sensitive positions inconsistent with national security. Such determinations are highly context-specific, depending, among many other factors, on the nature of the employee's position, its location, and the employee's access to agency systems. This is precisely the type of determination that the Supreme Court held was not subject to second-guessing by a non-expert outside body. *See Egan*, 484 U.S. at 529.

B. It is no answer to urge that the Board is familiar with evaluating employee conduct. The national security determinations at issue in these cases are not determinations that an employee's conduct has negatively affected agency operations. They are instead evaluations of the individual's *potential* to compromise national

security made by agency officials. As the Supreme Court explained in *Egan*, an adverse national security determination "does not equate with passing judgment upon an individual's character. Instead, it is only an attempt to predict his possible future behavior . . . It may be based, to be sure, upon past or present conduct, but it also may be based upon concerns completely unrelated to conduct." *Egan*, 484 U.S. at 528.

Amici in *Egan* also argued that the Board could review security clearance determinations because those determinations concerned the kinds of facts and judgments that the Board had expertise in evaluating. *See* Brief of Amicus Curiae National Federation of Federal Employees, at *9, *available at* 1987 WL 880364. The Supreme Court nonetheless held that the Board did not have jurisdiction to review the merits of an agency's security clearance determination. Respondents' and amici's similar argument in these cases must also be rejected.

Predictive judgments of whether an individual's employment in a national security sensitive position is clearly consistent with the interest of national security—whether or not the individual requires eligibility for a security clearance—must be made by agency officials familiar with the nature and duties of the position, the position's degree of sensitivity and role in the agency's mission, and the ways in which its occupant could bring about damage to national security. This risk analysis is entrusted to agency officials, just as a determination to designate a position as sensitive is entrusted to agency officials. *See Skees*, 864 F.2d at 1578. The Board has

expertise in merit systems principles and prohibited personnel practices, as amicus GAP notes. GAP 16. The Board, in contrast, lacks institutional competence to determine how and to what degree the duties of a particular position allow its incumbent to jeopardize national security and, in light of the duties of the particular position, what features of an individual's background could pose an unacceptable risk to national security.

Respondents point to the Board's decisions in *Adams v. Dep't of the Army*, 105 M.S.P.R. 50, 55 (2007), and *Jacobs v. Dep't of the Army*, 62 M.S.P.R. 688 (1994), among others, as demonstrating that the Board may review national security eligibility determinations. *See* Em. 51-52; Board 42-44; NTEU 20. Even assuming *Adams* and similar cases were correctly decided, the underlying decisions in those cases were not eligibility determinations, but instead "withdrawal or revocation of [an agency's] certification or other approval of the employee's fitness or other qualifications to hold his position." *Adams v. Dep't of the Army*, 105 M.S.P.R. 50, 55 (2007). For example, *Jacobs* involved an employee's failure to remain eligible for the Chemical Personnel Reliability Program, and *Adams* involved the agency's information assurance program. *Id.* at 693.[18]

[18] It can hardly be suggested that Congress's failure to act after two Board decisions more than thirteen years apart indicates its intent to narrow the scope of *Egan*. *Cf.* Em. 42. Indeed, the Board in *Jacobs* considered whether the determination in that case raised issues "*similar enough* to those raised by security clearance

Continued on next page.

The determinations at issue in these cases do not involve questions about an employee's "fitness" or "qualifications," but rather whether the agency is able to affirmatively conclude that employing an individual in a particular position is "clearly consistent" with national security and, as explained, are materially identical to security clearance determinations. E.O. 10,450, § 3. National security judgments consider factors that would not be relevant in a fitness determination, for example, an employee's susceptibility to coercion because of the presence of relatives in a country hostile to the United States.

C. Underscoring the error of its position, the Board claims not only authority to review the merits of an eligibility determination,[19] but also the authority to order the reinstatement of an employee into a particular position where an agency has determined the individual cannot be employed in that position in a manner clearly consistent with national security. If the Board exercises its own independent judgment and overturns an expert agency determination that an employee is ineligible for a national security sensitive position under its preponderance-of-the-evidence review and orders reinstatement of the employee to such a position, the agency's compliance

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determinations." 62 M.S.P.R. at 693 (emphasis added). Respondents' reading of those cases as indicating that *Egan* was confined to security clearance determinations is thus incorrect.

[19] The Board has asserted that it would apply its usual standards governing misconduct in these cases, which would include application of the *Douglas* factors to mitigate any agency "penalty." *See* ADD113; *Douglas v. Veterans Admin.*, 5 M.S.P.R. 280 (1981).

with that order would violate E.O. 10,450, which charges *agency heads* with ensuring that employment in a sensitive position only occurs when clearly consistent with national security. Congress cannot have intended this result.[20]

The employee respondents point to section 7532 as a response to the impossible position the Board's decision places agencies in. *See* Em. 49. But this is no answer. As explained, section 7532 does not mitigate the Board's error in these cases, and the *Egan* Court plainly rejected the argument that section 7532 indicates that review of the merits of an agency's national security determination is subject to review under section 7513.

D. Nothing short of total deference to the merits of the agency's determination regarding eligibility for a national security sensitive position is appropriate. Anything less is likewise inconsistent with *Egan*, the text of the CSRA, and the nature of the determinations at issue.

The Supreme Court's decision in *Egan* did not narrow the scope of the Board's review over the agency's national security determination by suggesting that greater deference was required, but instead foreclosed it completely. Moreover, there simply is no textual basis to create a special standard for review of agency determinations that

[20] Indeed, under the Board's decisions, it is not only administrative judges who are authorized to delve into the merits of national security determinations, but also arbitrators under 5 U.S.C. § 7121(e), when an employee has elected to proceed to arbitration.

an employee is incligible to occupy a national security sensitive position. *See* 5 U.S.C. § 7701(c)(1)(A) (providing a different standard of review for performance evaluations). And, as explained, the national security determinations at issue in this case are discretionary judgment calls that must be made by the expert agency officials entrusted with those decisions. These determinations may not be second-guessed, even under a "deferential" standard of review.

CONCLUSION

The decisions of the Board should be reversed.

Respectfully submitted,

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MAY 2013

ADDENDUM

Table of Contents

NOTE: This order is nonprecedential.

United States Court of Appeals for the Federal Circuit

JOHN BERRY, DIRECTOR, OFFICE OF PERSONNEL MANAGEMENT,
Petitioner,

v.

RHONDA K. CONYERS AND DEVON HAUGHTON NORTHOVER,
Respondents,

and

MERIT SYSTEMS PROTECTION BOARD,
Respondent.

2011-3207

Petition for Review of the Merit Systems Protection Board in consolidated case nos. CH0752090925-R-1 and AT0752100184-R-1.

Before RADER, *Chief Judge*, NEWMAN, LOURIE, BRYSON*, DYK, PROST, MOORE, O'MALLEY, REYNA, and WALLACH, *Circuit Judges*.

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* Judge Bryson assumed senior status on January 7, 2013, after participating in the decision regarding rehearing en banc.

PER CURIAM.

ORDER

Separate petitions for rehearing en banc were filed by Respondent Merit Systems Protection Board ("MSPB") and Respondents Rhonda K. Conyers ("Conyers") and Devon Haughton Northover ("Northover"). A single response was invited by the court and filed by Petitioner.

The petitions for panel rehearing were considered by the panel that heard the appeal, and thereafter the petitions for rehearing en banc, response, and brief of amici curiae were referred to the circuit judges who are authorized to request a poll of whether to rehear the appeal en banc. A poll was requested, taken, and the court has decided that the appeal warrants en banc consideration.

Upon consideration thereof,

IT IS ORDERED THAT:

(1) The petitions for panel rehearing of Respondent MSPB and Respondents Conyers and Northover are denied.

(2) The petitions for rehearing en banc of Respondent MSPB and Respondents Conyers and Northover are granted.

(3) The court's opinion of August 17, 2012 is vacated, and the appeal is reinstated.

(4) The parties are requested to file new briefs. The briefs should, inter alia, address the following issues:

a. Does the Supreme Court's ruling in *Department of the Navy v. Egan*, 484 U.S. 518 (1988), foreclose MSPB review of the merits of determinations that an employee is ineligible for a "sensitive" position, or is the ruling confined to determinations that an employee is ineligible to hold a security clearance?

b. To what extent, if any, has Congressional action pre or post-Egan demonstrated that Congress intended to preserve MSPB review of adverse actions with respect to employees holding "sensitive" positions that do not involve intelligence agencies or security clearances?

c. What are the differences between the relevant processes and criteria associated with obtaining security clearances, and those involved in determining whether an individual is deemed eligible to hold a "non-critical sensitive" or "critical sensitive" position that does not require a security clearance?

d. What problems, if any, would the MSPB encounter in determining adverse action appeals for employees holding "sensitive" positions not requiring a security clearance; to what extent should the MSPB defer to the agency's judgment on issues of national security in resolving such adverse action appeals?

(5) This appeal will be heard en banc on the basis of the additional briefing ordered herein and oral argument. An original and 30 copies of new en banc briefs shall be filed, and two copies of each en banc brief shall be served on opposing counsel. The en banc briefs of Conyers, Northover, and the MSPB are due 45 days from the date of this order. The en banc response brief is due within 30 days of service of the new en banc briefs of Conyers, Northover, and the MSPB, and the reply briefs within 15 days of service of the response brief. Briefs shall adhere to the type-volume limitations set forth in Federal Rule of Appellate Procedure 32 and Federal Circuit Rule 32.

(6) The court invites the views of amici curiae. Any such amicus briefs may be filed without consent and leave of court but otherwise must comply with Federal Rule of Appellate Procedure 29 and Federal Circuit Rule 29.

(7) Oral argument will be held at a time and date to be announced later.

FOR THE COURT

January 24, 2013
Date

/s/ Jan Horbaly
Jan Horbaly
Clerk

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United States Court of Appeals for the Federal Circuit

JOHN BERRY, DIRECTOR, OFFICE OF PERSONNEL MANAGEMENT,
Petitioner,

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RHONDA K. CONYERS AND DEVON HAUGHTON NORTHOVER,
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MERIT SYSTEMS PROTECTION BOARD,
Respondent.

2011-3207

Petition for Review of the Merit Systems Protection Board in Consolidated Case Nos. CH0752090925-R-1 and AT0752100184-R-1.

Decided: August 17, 2012

ABBY C. WRIGHT, Attorney, Appellate Staff, Commercial Litigation Branch, United States Department of Justice, of Washington, DC, argued for petitioner. With her on the brief were TONY WEST, Assistant Attorney General, JEANNE E. DAVIDSON, Director, TODD M.

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Before LOURIE, DYK, and WALLACH, *Circuit Judges*.

Opinion for the court filed by *Circuit Judge* WALLACH.
Dissenting opinion filed by *Circuit Judge* DYK.

WALLACH, *Circuit Judge.*

The Director of the Office of Personnel Management ("OPM") seeks review of the decision by the Merit Systems Protection Board ("Board") holding that the Supreme Court's decision in *Department of the Navy v. Egan*, 484 U.S. 518 (1988), limits Board review of an otherwise appealable adverse action only if that action is based upon eligibility for or a denial, revocation, or suspension of access to classified information. *Egan*, however, prohibits Board review of agency determinations concerning eligibility of an employee to occupy a "sensitive" position, regardless of whether the position requires access to classified information. Accordingly, we REVERSE and REMAND.

I. BACKGROUND

Rhonda K. Conyers ("Conyers") and Devon Haughton Northover ("Northover" and collectively, "Respondents")[1] were indefinitely suspended and demoted, respectively, from their positions with the Department of Defense ("Agency") after they were found ineligible to occupy "noncritical sensitive" positions.[2] Ms. Conyers and Mr.

[1] Although the Board, Ms. Conyers, and Mr. Northover are all Respondents, we refer to the Board as the "Board" and "Respondents" will refer to Ms. Conyers and Mr. Northover.

[2] Departments and agencies of the Government classify jobs in three categories: "critical sensitive," "noncritical sensitive," and "nonsensitive." *Egan*, 484 U.S. at 528. The underlying cases involve "noncritical sensitive" positions, which are defined as: "*Positions with potential to cause damage to . . . national security*, up to and including damage at the significant or serious level. These positions include: (1) Access to Secret, "L," Confidential classified information[;] (2) *Any other positions with*

Northover independently appealed the Agency's actions to the Board. In both appeals, the Agency argued that, because Respondents' positions were designated "noncritical sensitive," the Board could not review the merits of the Agency's determinations under the precedent set forth in *Egan*.

A. The *Egan* Holding

In *Egan*, the Supreme Court held that the Board plays a limited role in adverse action cases involving national security concerns. The respondent in *Egan* lost his laborer's job at a naval facility when he was denied a required security clearance. 484 U.S. at 520. Reversing our decision in *Egan v. Department of the Navy*, 802 F.2d 1563 (Fed. Cir. 1986), *rev'd*, 484 U.S. 518 (1988), the Court held that the Board does not have authority to review the substance of the security clearance determination, contrary to what is required generally in other adverse action appeals. 484 U.S. at 530-31. Rather, the Court held that the Board has authority to review only: (1) whether an Executive Branch employer determined the employee's position required a security clearance; (2) whether the clearance was denied or revoked; (3) whether the employee was provided with the procedural protections specified in 5 U.S.C. § 7513; and (4) whether transfer to a nonsensitive position was feasible. *Id.* at 530.

B. Ms. Conyers's Initial Proceedings

Ms. Conyers occupied a competitive service position of GS-525-05 Accounting Technician at the Defense Finance and Accounting Service. *Conyers v. Dep't of Def.*, 115 M.S.P.R. 572, 574 (2010). Following an investigation, the Agency's Washington Headquarters Services ("WHS")

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potential to cause harm to national security to a moderate degree . . . ." J.A. 326 (emphasis added).

Consolidated Adjudications Facility ("CAF") discovered information about Ms. Conyers that raised security concerns. J.A. 149-52. As a result, effective September 11, 2009, the Agency indefinitely suspended Ms. Conyers from her position because she was denied eligibility to occupy a sensitive position by WHS/CAF. *Conyers*, 115 M.S.P.R. at 574. The Agency reasoned that Ms. Conyers's noncritical sensitive "position required her to have access to sensitive information," and because WHS/CAF denied her such access, "she did not meet a qualification requirement of her position."[3] *Id.* at 574.

Ms. Conyers appealed her indefinite suspension to the Board. *Id.* In response, the Agency argued that *Egan* prohibited Board review of the merits of WHS/CAF's decision to deny Ms. Conyers eligibility for access "to sensitive or classified information and/or occupancy of a sensitive position." *Id.* On February 17, 2010, the administrative judge issued an order certifying the case for an interlocutory appeal and staying all proceedings pending resolution by the full Board. *Id.* at 575. In her ruling, the administrative judge declined to apply *Egan* and "informed the parties that [she] would decide the case under the broader standard applied in . . . other [5 U.S.C.] Chapter 75 cases which do not involve security clearances." *Id.* (brackets in original).

[3] The record indicates that Ms. Conyers requested an appearance before an administrative judge with the Defense Office of Hearings and Appeals ("DOHA") regarding her denial of eligibility to occupy a sensitive position. *Conyers*, 115 M.S.P.R. at 574; J.A. 123. DOHA ultimately denied relief. *Conyers*, 115 M.S.P.R. at 574. The Agency subsequently removed Ms. Conyers effective February 19, 2010. *Id.*

C. Mr. Northover's Initial Proceedings

Mr. Northover occupied a competitive service position of GS–1144–07 Commissary Management Specialist at the Defense Commissary Agency. *Northover v. Dep't of Def.*, 115 M.S.P.R. 451, 452 (2010). Effective December 6, 2009, the Agency reduced Mr. Northover's grade level to part-time GS–1101–04 Store Associate "due to revocation/denial of his Department of Defense eligibility to occupy a sensitive position." *Id.* at 453. In its Notice of Proposed Demotion, the Agency stated that Mr. Northover was in a position that was "designated as a sensitive position" and that WHS/CAF had denied him "eligibility for access to classified information and/or occupancy of a sensitive position." *Id.* at 453 (citation omitted).

Mr. Northover subsequently appealed the Agency's decision to the Board. *Id.* In response, the Agency argued it had designated the Commissary Management Specialist position a "moderate risk" national security position with a sensitivity level of "noncritical sensitive," and under *Egan*, the Board is barred from reviewing the merits of an agency's "security-clearance/eligibility determination." *Id.*

On April 2, 2010, contrary to the ruling in *Conyers*, the presiding chief administrative judge ruled that *Egan* applied and that the merits of the Agency's determination were unreviewable. *Id.* The chief administrative judge subsequently certified his ruling to the full Board. *Id.* All proceedings were stayed pending resolution of the certified issue. *Id.*

D. The Full Board's Decision in *Conyers* and *Northover*

On December 22, 2010, the full Board affirmed the administrative judge's decision in *Conyers* and reversed

the chief administrative judge's decision in *Northover*, concluding that *Egan* did not apply in cases where security clearance determinations are not at issue. *Conyers*, 115 M.S.P.R. at 590; *Northover*, 115 M.S.P.R. at 468. Specifically, the Board held that *Egan* limited the Board's review of an otherwise appealable adverse action only if that action is based upon eligibility for or a denial, revocation, or suspension of access to classified information. [4] *Conyers*, 115 M.S.P.R. at 590; *Northover*, 115 M.S.P.R. at 467-68. Because Ms. Conyers and Mr. Northover did not occupy positions that required access to classified information, the Board concluded that *Egan* did not preclude Board review of the underlying Agency determinations. *Conyers*, 115 M.S.P.R. at 585; *Northover*, 115 M.S.P.R. at 464.

OPM moved for reconsideration of the Board's decisions, which the Board denied. *Berry v. Conyers, et al.*, 435 F. App'x 943, 944 (Fed. Cir. 2011) (order granting OPM's petition for review). OPM petitioned for review to this court, and the petition was granted on August 17, 2011. *Id.* We have jurisdiction to review the Board's final decision under 5 U.S.C. § 7703(d) and 28 U.S.C. § 1295(a)(9).[5]

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[4] The Board considered "security clearance" to be synonymous to "access to classified information." *Conyers*, 115 M.S.P.R. at 580.

[5] On remand, *Conyers* was dismissed as moot, and *Northover* was dismissed without prejudice to file again pending the resolution of this petition. J.A. 900-05; 1821. To the extent there are any Article III case or controversy concerns as a result of these dismissals, we find that OPM, at the least, maintains sufficient interests in this petition to satisfy any Article III case or controversy requirement. *See Horner v. Merit Sys. Protection Bd.*, 815 F.2d 668, 671 (Fed. Cir. 1987) ("We have no

II. STATUTORY GROUNDS FOR NATIONAL SECURITY BASED REMOVAL OF GOVERNMENT EMPLOYEES

The statutes provide a two-track system for removal of employees based on national security concerns. *Egan*, 484 U.S. at 526. In particular, relevant provisions of the Civil Service Reform Act of 1978 ("CSRA" or the "Act"), Chapter 75 of Title 5 of the United States Code entitled, "Adverse Actions," provides two subchapters related to removals. The first, subchapter II (§§ 7511-7514), relates to removals for "cause." Under § 7512, an agency's indefinite suspension and a reduction in grade of an employee, as here, may qualify as "adverse actions." 5 U.S.C. § 7512(2)-(3). An employee subject to an adverse action is entitled to the protections of § 7513, which include written notice of the specific reasons for the proposed action, an opportunity to respond to the charges, the requirement that the agency's action is taken to promote the efficiency of the service, and the right to review by the Board of the action. An employee removed for "cause" has the right, under § 7513(d), to appeal to the Board. On review of the

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question that the issue of the [Office of Special Counsel]'s authority to bring a general disciplinary action against an employee, and in turn the issue of the board's jurisdiction to hear such a case, the latter being dependent on the former, is of vital interest to OPM, which has administrative responsibility for personnel practices and policies throughout most parts of government. These interests are more than sufficient to satisfy the section 7703(d) requirements and any Article III case or controversy requirement."); *see also Berry*, 435 F. App'x at 945 (granting petition for review because "[w]e agree that the issues in the Board's orders raise an issue of such interest, i.e., whether the agency must disclose its determinations regarding what it classifies as issues of national security and must litigate the merits of such a determination, and thus are subject to immediate review.").

action by the Board under § 7701,[6] the Board may sustain the agency's action only if the agency can show that its decision is supported by a preponderance of the evidence. 5 U.S.C. § 7701(c)(1)(B).[7]

The second, subchapter IV (§§ 7531-7533), relates to removals based upon national security concerns. An employee suspended under § 7532(a) is not entitled to appeal to the Board. Nonetheless, the statute provides for a summary removal process that entitles the employee to specified pre-removal procedural rights, including a hearing by an agency authority. 5 U.S.C. § 7532(c).

III. *EGAN*'S APPLICATION TO *CONYERS* AND *NORTHOVER*

The Board and Respondents urge this court to limit *Egan*'s application to security clearance determinations, reasoning that national security concerns articulated in that case pertain to access to classified information only. *Egan* cannot be so confined. Its principles instead require that courts refrain from second-guessing Executive Branch agencies' national security determinations concerning eligibility of an individual to occupy a sensitive position, which may not necessarily involve access to

[6] 5 U.S.C. § 7701 provides, in relevant part: "An employee, or applicant for employment, may submit an appeal to the Merit Systems Protection Board from any action which is appealable to the Board under any law, rule, or regulation." 5 U.S.C. § 7701(a). It is undisputed that Respondents are "employees" as defined in the applicable statutes in this case. *See* 5 U.S.C. § 7511(a)(1)(A) ("[E]mployee means . . . an individual in the competitive service . . . .").

[7] The two cases on appeal here proceeded pursuant to 5 U.S.C. § 7513(d).

classified information. For the following reasons, *Egan* must apply.

A. *Egan* Addressed Broad National Security Concerns That Are Traditionally the Responsibility of the Executive Branch

Egan, at its core, explained that it is essential for the Executive Branch and its agencies to have broad discretion in making determinations concerning national security. Affording such discretion to agencies, according to *Egan*, is based on the President's "authority to classify and control access to information bearing on national security and to determine" who gets access, which "flows primarily from [the Commander in Chief Clause] and exists quite apart from any explicit congressional grant." 484 U.S. at 527. *Egan* also recognized the general principle that foreign policy is the "province and responsibility of the Executive." *Id.* at 529 (citation omitted). Accordingly, the Court reasoned:

> [I]t is not reasonably possible for an outside nonexpert body to review the substance of such a[n agency determination concerning national security] and to decide whether the agency should have been able to make the necessary affirmative prediction [that a particular individual might compromise sensitive information] with confidence. Nor can such a body determine what constitutes an acceptable margin of error in assessing the potential risk.

Id. Hence, unless Congress specifically has provided otherwise, courts traditionally have shown "great deference" to what "the President—the Commander in Chief—has determined . . . is essential to national security." *Winter v. Natural Res. Def. Council*, 555 U.S. 7, 24, 26 (2008) (citation omitted).

Despite the undisputed role of the Executive within this realm, Respondents argue applying *Egan* to these cases "may deprive either the Congress or the Judiciary of all freedom of action merely by invoking national security." Resp'ts' Br. 23. Certainly, under the Constitution, Congress has a substantial role in both foreign affairs and national security. Congress, therefore, has the power to guide and limit the Executive's application of its powers. Nevertheless, no controlling congressional act is present here.

As *Egan* recognized, the CSRA did not confer broad authority to the Board in the national security context.[8]

[8] The dissent states the majority has "completely fail[ed] to come to grips with the [CSRA]." Dissent Op. at 7. In 1990, the CSRA was amended after the Court's decision in *U.S. v. Fausto*, 484 U.S. 439 (1988). There, the Court decided that the CSRA's silence regarding appeal rights for non-preference eligible members of the excepted service reflected congressional intent to preclude any review under chapter 75 for such employees. *Id.* at 448. In response, Congress passed the Civil Service Due Process Amendments ("1990 Amendments") expanding the Board's jurisdiction to some, but not all, non-preference eligible excepted service employees. Pub. L. No. 101–376, 104 Stat. 461 (1990).

The dissent construes the 1990 Amendments as extending by implication Board review of agency determinations concerning sensitive positions. Dissent Op. at 10. Because certain agencies, such as the Federal Bureau of Investigation, Central Intelligence Agency, and National Security Agency were expressly exempted, the dissent posits that Board review must extend to all other positions that were not excluded. *Id.* at 11. Certain employees of the General Accounting Office, the Veterans Health Sciences and Research Administration, the Postal Service, the Postal Rate Commission, and the Tennessee Valley Authority, however, were also excluded, because separate statutes excluded the employees of these agencies from the normal appeals process. H.R. Rep. No. 101-328 at 5

484 U.S. at 530-31 ("An employee who is removed for 'cause' under § 7513, when his required clearance is denied, is entitled to the several procedural protections specified in that statute. The Board then may determine whether such cause existed, whether in fact clearance was denied, and whether transfer to a nonsensitive position was feasible. *Nothing in the Act, however, directs or*

(1989), *reprinted in* 1990 U.S.C.C.A.N. 695. Thus, the dissent's view that Congress "crafted some exceptions for national security and not others" is speculative because "national security" was not a factor providing for these exclusions.

Similarly, the dissent refers to the Department of Defense's ("DOD") creation of the National Security Personnel System ("NSPS") in 2003 to further support the notion that Congress spoke on the issue before this court. Dissent Op. at 15. The dissent's position is neither supported by statutory language nor legislative history. The statute creating the NSPS, the subsequent repeal of certain regulations concerning the DOD's appeals process, and the ultimate repeal of the statute creating the NSPS itself in 2009, do not show that Congress intended to preclude the DOD from insulating employment decisions concerning national security from Board review. NSPS was established to overhaul the then-existing personnel management system and polices of the DOD. *See* National Defense Authorization Act, Pub. L. 108–136, 117 Stat. 1392 (2003). In 2009, NSPS was repealed largely due in part to strong opposition from labor organizations regarding issues of collective bargaining. *See* Department of Defense Human Resources Management and Labor Relations Systems, 70 Fed. Reg. 66,123; *see also* S. Rep. No. 111-35 at 185 (2009) ("[T]he committee has received many complaints from DOD employees during the 5 years during which the [DOD] has sought to implement NSPS, to the detriment of needed human capital planning and workforce management initiatives."). There is nothing in these statutes that shows Congress intended Board review of agency determinations pertaining to employees in sensitive positions.

empowers the Board to go further.") (emphasis added). As a result, Congress presumably has left the President and Executive Branch agencies broad discretion to exercise their powers in this area. *See Dames & Moore v. Regan*, 453 U.S. 654, 678 (1981) ("Congress cannot anticipate and legislate with regard to every possible action the President may find it necessary to take or every possible situation in which he might act," and "[s]uch failure of Congress . . . does not, 'especially . . . in the areas of foreign policy and national security,' imply 'congressional disapproval' of action taken by the Executive.") (quoting *Haig v. Agee*, 453 U.S. 280, 291 (1981)). Accordingly, when "the President acts pursuant to an express or implied authorization from Congress," his actions should be "supported by the strongest of presumptions and the widest latitude of judicial interpretation, and the burden of persuasion . . . rest[s] heavily upon any who might attack it." *Id.* at 668 (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring)). Courts thus must tread lightly when faced with the potential of second-guessing discretionary agency determinations concerning national security.

The existence of § 7532 does not alter the agencies' broad discretion to exercise their powers in the national security context. The Board and Respondents argue that Congress has spoken directly on the issue of removal for national security concerns by enacting § 7532, and that applying *Egan* in this instance "would in essence allow the Executive to replace § 7532 with § 7513 . . . rendering § 7532 a nullity." Resp'ts' Br. 24-25; *see* Board's Br. 42-43. This argument is similar, if not identical, to those rejected by the *Egan* Court. 484 U.S. at 533 ("The argument is that the availability of the § 7532 procedure is a 'compelling' factor in favor of Board review of a security-clearance denial in a case under § 7513.").

In *Egan*, the Court observed the alternative availability of § 7513 and § 7532. *Id.* at 532. Specifically, the Court acknowledged that § 7532 does not preempt § 7513 and that the two statutes stand separately and provide alternative routes for administrative action. *Id.* In addition, the Court found that the two sections were not anomalous, but merely different. *Id.* at 533. The Court also found that one section did not necessarily provide greater procedural protections than the other. *Id.* at 533-34.

The Court in *Carlucci v. Doe*, 488 U.S. 93 (1988), further articulated and clarified § 7532's applicability. In that case, the Court determined that the summary removal mechanism set out in § 7532, as well as 50 U.S.C. § 833,[9] were discretionary mechanisms in cases involving dismissals for national security reasons. *Id.* at 100. The Court found that § 7532 was not mandatory, but rather permissive: "'Notwithstanding other statutes,' the head of an agency 'may' suspend and remove employees 'in the interests of national security.'" *Id.* (quoting § 7532) (finding nothing in the legislative history of § 7532 indicating that the statute's procedures are the exclusive means for removals on national security grounds or that § 7532 displaces the otherwise applicable removal provisions of the agencies covered by the section). Therefore, it was held that the National Security Agency was not required to apply either § 7532 or § 833 and could have acted under

[9] 50 U.S.C. § 833 was a summary removal provision in the 1964 National Security Agency Personnel Security Procedures Act, 50 U.S.C. §§ 831-35 (repealed October 1, 1996).

its ordinary dismissal procedure if it so wished.[10] *Id.* at 99-100.

Moreover, *Carlucci* held that Congress enacted § 7532 to "supplement, not narrow, ordinary agency removal procedures." *Id.* at 102. The Court reasoned that because of its summary nature, "Congress intended § 7532 to be invoked only where there is 'an immediate threat of harm to the national security' in the sense that the delay from invoking 'normal dismissal procedures' could 'cause serious damage to the national security.'" *Id.* (quoting *Cole v. Young*, 351 U.S. 536, 546 (1956)). Consequently, should § 7532 be mandatory as the Board and Respondents effectively argue, it would become the exclusive procedure in this case and similar cases, and "no national security termination would be permissible without an initial suspension and adherence to the *Cole v. Young* standard." *Id.* Given *Carlucci*'s teaching, we are unconvinced that Congress intended any such result when it

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[10] The *Carlucci* Court also affirmed *Egan*'s conclusion regarding §§ 7513 and 7532:

> We thus agree with the conclusion of the Merit Systems Protection Board in a similar case that "section 7532 is not the exclusive basis for removals based upon security clearance revocations," *Egan v. Department of the Navy*, 28 M.S.P.R. 509, 521 (1985), and with the Court of Appeals for the Federal Circuit that "[t]here is nothing in the text of section 7532 or in its legislative history to suggest that its procedures were intended to preempt section 7513 procedures whenever the removal could be taken under section 7532. The language of section 7532 is permissive." *Egan v. Department of the Navy*, 802 F.2d 1563, 1568 (Fed. Cir. 1986), *rev'd*, 488 U.S. 518 (1988).

Carlucci, 488 U.S. at 104.

enacted § 7532. *Id.* Accordingly, eligibility to occupy a sensitive position is a discretionary agency determination, principally within the purview of the Executive Branch, the merits of which are unreviewable by the Board.

B. *Egan*'s Analysis Is Predicated On "National Security Information"

The Board and Respondents conflate "classified information" with "national security information," but *Egan* does not imply those terms have the same meaning.[11] In fact, *Egan*'s core focus is on "national security information," not just "classified information." 484 U.S. at 527 (recognizing the government's "compelling interest in withholding *national security information*") (emphasis added). As *Egan* noted, the absence of a statutory provision in § 7512 precluding appellate review of determinations concerning national security creates a presumption in favor of review. *Id.* The Court, nevertheless, held that this "proposition is not without limit, and *it runs aground when it encounters concerns of national security*, as in this case, where the grant of security clearance to a particular employee, a sensitive and inherently discretionary judgment call, is committed by law to the appropriate agency of the Executive Branch." *Id.* (emphasis added).[12] *Egan* therefore is predicated on broad national security concerns, which may or may not include issues of access to

[11] Likewise, the dissent's key error is that it conflates "authority to classify and control access to information bearing on national security" with "the authority to protect classified information." Dissent Op. at 24-25.

[12] It is clear from the use of the clause "as in this case" following the "runs aground" clause that national security concerns are the Supreme Court's general proposition, and security clearances simply exemplify the types of concerns falling within this broad category.

classified information. Thus, *Egan* is not limited to adverse actions based upon eligibility for or access to classified information.

In addition, sensitive positions concerning national security do not necessarily entail access to "classified information" as the Board and Respondents contend. The Board cites *Cole v. Young* and references the Court's discussion of the legislative history of the Act of August 26, 1950[13] in support of its proposition that national security concerns relate strictly to access to classified information. However, the Board's analysis is flawed.

Cole held that a sensitive position is one that *implicates* national security, and in defining "national security" as used in the Act of August 26, 1950, the Court concluded that the term "was intended to comprehend only those activities of the Government that are *directly concerned with the protection of the Nation from internal subversion or foreign aggression*, and not those which contribute to the strength of the Nation only through their impact on the general welfare." 351 U.S. at 544 (emphasis added).[14] Thus, even in *Cole*, sensitive posi-

[13] The Act of August 26, 1950, Pub. L. No. 81-733, ch. 803, 64 Stat. 476 (1950), gave heads of certain departments and agencies of the Government summary suspension and unreviewable dismissal powers over their civilian employees, when deemed necessary in the interest of the national security of the United States. *Conyers*, 115 M.S.P.R. at 580 n.17. The Act was the precursor to 5 U.S.C. § 7532. *Id.*

[14] It follows that an employee can be dismissed 'in the interest of the national security' under the Act only if he occupies a *'sensitive' position*, and thus that a condition precedent to the exercise of the dismissal authority is a determination by the agency head that the *position occupied is one affected with the 'national security.'*" *Cole*, 351

tions were defined as those that involve national security information and not necessarily those that involve classified information.

Indeed, "sensitive positions" that can affect national security and "access to classified information" are parallel concepts that are *not* necessarily the same. As the Court reasoned:

> Where applicable, the Act authorizes the agency head summarily to suspend an employee pending investigation and, after charges and a hearing, finally to terminate his employment, such termination not being subject to appeal. There is an obvious justification for the summary suspension power where the employee occupies a "sensitive" position in which he could cause serious damage to the national security during the delay incident to an investigation and the preparation of charges. *Likewise*, there is a reasonable basis for the view that an agency head who must bear the responsibility for the protection of classified information committed to his custody should have the final say in deciding whether to repose his trust in an employee who has access to such information.

Cole, 351 U.S. at 546 (emphasis added).[15] Hence, contrary to the Board and Respondents' contentions, "classi-

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U.S. at 551 (emphasis added). Accordingly, the Court in *Cole* remanded the case to determine whether the petitioner's position was one in which he could adversely affect national security. *Id.* at 557.

[15] By using the word, "likewise," the Court compares the two concepts, "sensitive positions" and "access to classified information." In doing so, it makes clear that they are parallel concepts that are not the same.

fied information" is not necessarily "national security information" available to an employee in a sensitive position.

The Board and Respondents' focus on one factor, eligibility of access to classified information, is misplaced.[16] Government positions may require different types and levels of clearance, depending upon the sensitivity of the position sought. *Egan*, 484 U.S. at 528. A government appointment is expressly made subject to a background investigation that varies in scope according to the degree of adverse effect the applicant could have on national security. *Id.* (citing Exec. Order No. 10,450, § 3, 3 C.F.R. 937 (1949-1953 Comp.)). As OPM states: "An agency's national security calculus will vary widely depending upon, *inter alia*, the agency's mission, the particular

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[16] The centerpiece of the *Egan* analysis, Executive Order No. 10,450, makes no mention of "classified information." Exec. Order No. 10,450, § 3, 3 C.F.R. 937 (1949-1953) ("The head of any department or agency shall designate, or cause to be designated, any position within his department or agency the occupant of which could bring about, by virtue of the nature of the position, *a material adverse effect on the national security as a sensitive position.*") (emphasis added). In addition, other relevant statutes and regulations define "sensitive" position in the broadest sense by referring to "national security" generally. *See* 10 U.S.C. § 1564 ("Security clearance investigations . . . (e) *Sensitive duties.*--For the purposes of this section, *it is not necessary for the performance of duties to involve classified activities or classified matters* in order for the duties to be considered sensitive and critical to the national security.") (emphasis added); *see also* 5 C.F.R. § 732.102 ("(a) For purposes of this part, the term *national security position* includes: (1) Those positions that involve activities of the Government that are *concerned with the protection of the nation from foreign aggression or espionage* . . . .") (emphasis added).

project in question, and the degree of harm that would be caused if the project is compromised." OPM's Br. 33. As a result, an agency's determination in controlling access to national security information entails consideration of multiple factors.

For example, categorizing a sensitive position is undertaken without regard to access to classified information, but rather with regard to the effect the position may have on national security. *See* Exec Order No. 10,450 § 3. Similarly, predictive judgments[17] are predicated on an individual's potential to compromise information, which might be unclassified. Consequently, the inquiry in these agency determinations concerning national security is not contingent upon access to classified information.

Finally, *Egan*'s concerns regarding the agencies' "clearly consistent with the interests of national security" standard conflicting with the Board's preponderance of the evidence standard apply equally here. *Egan* held that:

> As noted above, security clearance normally will be granted only if it is "clearly consistent with the interests of the national security." The Board, however, reviews adverse actions under a preponderance of the evidence standard. § 7701(c)(1)(B). These two standards seem inconsistent. It is difficult to see how the Board would be able to review

[17] A predictive judgment of an individual is "an attempt to predict his [or her] possible future behavior and to assess whether, under compulsion of circumstances or for other reasons, he [or she] might compromise sensitive information. It may be based, to be sure, upon past or present conduct, but it also may be based upon concerns completely unrelated to conduct such as having close relatives residing in a country hostile to the United States." *Egan*, 484 U.S. at 528-29.

> security-clearance determinations under a preponderance of the evidence standard without departing from the "clearly consistent with the interests of the national security" test. The clearly consistent standard indicates that security-clearance determinations should err, if they must, on the side of denials. Placing the burden on the Government to support the denial by a preponderance of the evidence would inevitably shift this emphasis and involve the Board in second-guessing the agency's national security determinations.

484 U.S. at 531. An agency's determination of an employee's ineligibility to hold a sensitive position must be "consistent with the interests of national security." *See* Exec. Order No. 10,450, § 3. Thus, such agency determinations cannot be reviewable by the Board because this would improperly place an inconsistent burden of proof upon the government. Accordingly, *Egan* prohibits review of Executive Branch agencies' national security determinations concerning eligibility of an individual to occupy a sensitive position, which may not necessarily involve access to classified information.

IV. UNCLASSIFIED INFORMATION CAN HAVE A MATERIAL ADVERSE EFFECT ON NATIONAL SECURITY

National security concerns render the Board and Respondents' positions untenable. It is naive to suppose that employees without direct access to already classified information cannot affect national security. The Board and Respondents' narrow focus on access to classified

information ignores the impact employees without security clearances, but in sensitive positions, can have.[18]

[18] There are certainly numerous government positions with potential to adversely affect national security. The Board goes too far by comparing a government position at a military base commissary to one in a "Seven Eleven across the street." Oral Argument at 28:10–15, *Berry v. Conyers, et al.*, 2011-3207, available at http://www.cafc.uscourts.gov/oral-argument-recordings/search/audio.html. Commissary employees do not merely observe "[g]rocery store stock levels" or otherwise publicly observable information. Resp'ts' Br. 20. In fact, commissary stock levels of a particular unclassified item – sunglasses, for example, with shatterproof lenses, or rehydration products – might well hint at deployment orders to a particular region for an identifiable unit. Such troop movements are inherently secret. *Cf. Near v. State of Minnesota ex rel. Olson*, 283 U.S. 697, 716 (1931) ("When a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight and that no Court could regard them as protected by any constitutional right . . . . No one would question but that a government might prevent actual obstruction to its recruiting service or the *publication of the sailing dates of transports or the number and location of troops*.") (citing *Schenck v. United States*, 294 U.S. 47, 52 (1919)) (emphasis added). This is not mere speculation, because, as OPM contends, numbers and locations could very well be derived by a skilled intelligence analyst from military commissary stock levels. *See* Oral Argument at 13:19-14:03, *Berry v. Conyers, et al.*, 2011-3207, available at http://www.cafc.uscourts.gov/oral-argument-recordings/search/audio.html (Q: "Can a position be sensitive simply because it provides observability? That is, one of these examples that was given was someone working at a commissary; it seems to me that someone working at a commissary has an opportunity without access to classified information to observe troop levels, potential for where someone is going, from what they are buying, that sort of thing." A: "I think that is right your

Defining the impact an individual may have on national security is the type of predictive judgment that must be made by those with necessary expertise. *See Egan*, 484 U.S. at 529 ("The attempt to define not only the individual's future actions, but those of outside and unknown influences renders the 'grant or denial of security clearances . . . an inexact science at best.'") (quoting *Adams v. Laird*, 420 F.2d 230, 239 (D.C. Cir. 1969)). The sources upon which intelligence is based are often open and publically available. Occasionally, intelligence is obtained from sources in a fashion the source's government would find improper. Occasionally, those means of obtention are coercive and/or subversive.[19]

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honor. We agree with that, and I think in *Egan*, he, Mr. Egan worked on a nuclear submarine. And so, part of it was simply from what he was observing by coming and going of a nuclear submarine. And so, sensitivity can be the place where the employee works, what are they able to observe, what could they infer from, what you say, from the purchases and shipments . . . .").

[19] For example, the intelligence community may view certain disparaging information concerning an employee as a vulnerability which can be used to blackmail or coerce information out of the individual. *See Egan*, 484 U.S. at 528 (recognizing that the government has a compelling interest in protecting truly sensitive information from those who, "under compulsion of circumstances or for other reasons . . . might compromise sensitive information."); *see also* Exec. Order 10,450, § 8 ("[I]nvestigations conducted . . . shall be designed to develop information as to whether the employment or retention in employment . . . is clearly consistent with . . . national security . . . . Such information [relating, but not limited to] . . . (ii) Any deliberate misrepresentations, falsifications, or omissions of *material facts* . . . (iii) Any criminal, infamous, dishonest, immoral, or notoriously disgraceful conduct, habitual use of intoxicants to excess, drug addiction, sexual perversion, or *financial irresponsi-*

This area of National Security Law is largely about preventing human source intelligence gathering in a manner which does not, in an open society, unnecessarily limit the public's right to access information about its government's activities. Still, there clearly is a need for such prevention. Within the sphere of national security limitations on government employment, our society has determined that courts should tolerate and defer to the agencies' threat limiting expertise. *See id.*

While threats may change with time, *Egan*'s analysis remains valid. The advent of electronic records management, computer analysis, and cyber-warfare have made potential espionage targets containing means to access national security information vastly more susceptible to harm by people without security clearances. The mechanics of planting within a computer system a means of intelligence gathering are beyond the ken of the judiciary; what matters is that there are today more sensitive areas of access than there were when *Egan* was authored. Its underlying analysis, nevertheless, is completely applicable—the President, as Commander-in-Chief, has the right and the obligation, within the law, to protect the government against potential threats. *Egan*, 484 U.S. at 527.

Some rights of government employees are certainly abrogated in national security cases. The Board and Respondents must recognize that those instances are the result of balancing competing interests as was the case in *Egan* and as is the case here. *See Hamdi v. Rumsfeld*, 542 U.S. 507, 529 (2004) ("[T]he process due in any given instance is determined by weighing the 'private interest that will be affected by the official action' against the

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bility.") (emphasis added). Hence, as the Agency found, information regarding Ms. Conyers's debt is a reasonable concern. *See* J.A. 149-52.

Government's asserted interest, 'including the function involved' and the burdens the Government would face in providing greater process.") (quoting *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976)).[20] Hence, as Lord Cyril Radcliffe noted, security must be weighed against other important questions "in that free dialogue between government . . . and people" out of which public life is built.[21]

In our society, it has been accepted that genuine and legitimate doubt is to be resolved in favor of national security.[22] *See Egan*, 484 U.S. at 527; *see also United*

[20] Working for the government is not only an example of civic duty but also an honorable and privileged undertaking that citizens cannot take lightly. This is especially true when the government position implicates national security. In other words, being employed by a government agency that deals in matters of national security is not a fundamental right. Accordingly, the competing interests in this case undoubtedly weigh on the side of national security.

[21] 218 Parl. Deb., H.L. (5th ser.) (1967) 781-83, available at http://hansard.millbanksystems.com/lords/1967/jul/06/the-d-notice-system-radcliffe-committees (discussing the publication of a story concerning national security).

[22] Although adverse actions of this type are largely unreviewable, courts may examine allegations of constitutional violations or allegations that an agency violated its own procedural regulations. *See, e.g., Egan*, 484 U.S. at 530. For example, the government's invocation of national security authority does not preclude judicial review in instances involving fundamental rights. *See Hamdi*, 542 U.S. at 529-30 (finding due process violation of those classified as "enemy combatants" and affording great weight to physical liberty as a fundamental right). On the other hand, courts generally do not accord similar weight to an individual in cases concerning national security where no such fundamental right is implicated. *See, e.g.*,

States v. Robel, 389 U.S. 258, 267 (1967) ("[W]hile the Constitution protects against invasions of individual rights, it does not withdraw from the Government the power to safeguard its vital interests . . . . The Government can deny access to its secrets to those who would use such information to harm the Nation.") (citation omitted). That was the philosophical underpinning of *Egan* and it is the holding of this court today. Accordingly, the merits of these agency determinations before us are not reviewable by the Board.

V. CONCLUSION

For the foregoing reasons, the Board cannot review the merits of Executive Branch agencies' national security determinations concerning eligibility of an employee to

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Bennet v. Chertoff, 425 F.3d 999, 1004 (D.C. Cir. 2005) (holding that substantial evidence of national security concerns as a contemporaneous reason for the agency's action in a Title VII case was enough for resolution in favor of executive discretion). In other very limited circumstances, Title VII claims raised in the context of a security clearance investigation may be justiciable. In *Rattigan v. Holder*, --- F.3d ----, No. 10-5014, 2012 WL 2764347 (D.C. Cir. July 10, 2012), the court held that: (1) "*Egan*'s absolute bar on judicial review covers only security clearance-related decisions made by trained Security Division personnel and does not preclude all review of decisions by other FBI employees who merely report security concerns," *id.* at *3; and (2) "Title VII claim[s] may proceed only if . . . [it can be shown] that agency employees acted with a retaliatory or discriminatory motive in reporting or referring information that they knew to be false," *id.* at *7. Although distinguishable from this case because *Rattigan* is specific only to security clearances, *Rattigan* does emphasize the importance of predictive judgments and the deference that courts must afford Executive Branch agencies in matters concerning national security. *Id.* at *3-5.

occupy a sensitive position that implicates national security. As OPM notes, "there is nothing talismanic about eligibility for access to classified information." OPM's Br. 27. The core question is whether an agency determination concerns eligibility of an employee to occupy a sensitive position that implicates national security. When the answer to that question is in the affirmative, *Egan* applies and the Board plays a limited role in its review of the determination. We REVERSE and REMAND for further proceedings consistent with this decision.

REVERSED AND REMANDED

United States Court of Appeals for the Federal Circuit

JOHN BERRY, DIRECTOR, OFFICE OF PERSONNEL MANAGEMENT,
Petitioner,

v.

RHONDA K. CONYERS AND DEVON HAUGHTON NORTHOVER,
Respondents,

and

MERIT SYSTEMS PROTECTION BOARD,
Respondent.

2011-3207

Petition for Review of the Merit Systems Protection Board in consolidated case nos. CH0752090925-R-1 and AT0752100184-R-1.

DYK, *Circuit Judge*, dissenting.

The majority, reversing the Merit Systems Protection Board ("Board"), holds that hundreds of thousands of federal employees—designated as holding national security positions—do not have the right to appeal the merits of adverse actions to the Board simply because the Department of Defense has decided that such appeals should not be allowed.

The majority reaches this conclusion even though the Civil Service Reform Act of 1978 ("CSRA"), 5 U.S.C. § 1101 et seq., unquestionably gives these employees the right to appeal the merits of adverse agency personnel actions to the Board, and Congress has acted specifically to deny Board jurisdiction under the CSRA with respect to certain national security agencies—the Central Intelligence Agency ("CIA"), the Federal Bureau of Investigation ("FBI"), and intelligence components of the Department of Defense—but has not exempted the non-intelligence components of the Department of Defense involved here. And the majority reaches this conclusion despite the fact that Congress in 2003 authorized the Department of Defense to create just such an exemption for its non-intelligence components and then repealed that authorization in 2009. The majority offers little explanation as to how its decision can be consistent with the CSRA other than to dismissively state that "no controlling congressional act is present here." Majority Op. at 11.

The majority's sole ground for its reversal of the Board is the Supreme Court's decision in *Department of the Navy v. Egan*, 484 U.S. 518 (1988). What the Supreme Court itself characterized as the "narrow" decision in *Egan* does not remotely support the majority's position. *See id.* at 520. It simply holds that where access to classified information is a necessary qualification for a federal position, revocation of a security clearance pursuant to the predecessor of Executive Order No. 12,968, 60 Fed. Reg. 40,245 (Aug. 2, 1995), is a ground for removal, and that the merits of the security clearance revocation are outside the Board's jurisdiction. The employees' positions here required no such access, and the employees in question had no security clearances. Far from supporting elimination of Board jurisdiction in such circumstances, *Egan* explicitly recognized that national security employ-

ees could challenge their removal before the Board. 484 U.S. at 523 n.4 (noting that where the agency fails to invoke the summary removal procedures of 5 U.S.C. § 7532, an employee's "removal . . . presumably would be subject to Board review as provided in § 7513.").

The breadth of the majority's decision is exemplified by the low level positions involved in this very case. Ms. Conyers served as a GS-05 Accounting Technician (approximately $32,000 to $42,000 annual salary range) at the Defense Finance and Accounting Service. Mr. Northover was employed by the Defense Commissary Agency as a GS-07 Commissary Management Specialist (approximately $39,000 to $50,000 annual salary range), where he performed inventory control and stock management duties. I respectfully dissent.[1]

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[1] Quite apart from the merits, it seems to me that Ms. Conyers's case is moot. The Office of Personnel Management ("OPM") admits that "no ongoing dispute exists between Ms. Conyers and the Department of Defense." OPM Br. at 20 n.12. Relying on *Horner v. Merit Systems Protection Board*, 815 F.2d 668 (Fed. Cir. 1987), the majority notes that although the appeal as to Ms. Conyers was dismissed as moot, "OPM . . . maintains sufficient interests in this petition to satisfy any Article III case or controversy requirement." Majority Op. at 7 n.5. I disagree. OPM's only interest in Ms. Conyers's case is in securing an advisory opinion on the requirements of federal law. Nothing is better established than the impermissibility under Article III of rendering such advisory opinions. *See Flast v. Cohen*, 392 U.S. 83, 96 (1968) ("[I]t is quite clear that the oldest and most consistent thread in the federal law of justiciability is that the federal courts will not give advisory opinions." (internal quotation marks omitted)).

Horner is readily distinguishable from this case. In *Horner*, the result of the appeal would have had consequences for the employee, as "the disciplinary action against him [would] be a nullity if [the court] overturn[ed]

I

At the outset, it is important to be clear about the exact nature of the majority's decision. Under the majority's expansive holding, where an employee's position is designated as a national security position, *see* 5 C.F.R. § 732.201(a),[2] the Board lacks jurisdiction to review the underlying merits of any removal, suspension, demotion, or other adverse employment action covered by 5 U.S.C. § 7512. The majority holds that "the Board cannot review the merits of Executive Branch agencies' national security determinations concerning eligibility of an employee to occupy a sensitive position that implicates national security." Majority Op. at 26. The majority concedes that its holding renders "adverse actions of this type [ ] largely unreviewable."[3] Majority Op. at 25 n.22. Thus, the

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the board's decision." 815 F.2d at 671. In this case, even if the Board is overturned, Ms. Conyers will not be affected because she has already received all relief to which she is entitled based on her suspension. *See Cooper v. Dep't of the Navy*, 108 F.3d 324, 326 (Fed. Cir. 1997) ("If an appealable action is canceled or rescinded by an agency, any appeal from that action becomes moot.").

[2] 5 C.F.R. § 732.201(a) provides, "the head of each agency shall designate, or cause to be designated, any position within the department or agency the occupant of which could bring about, by virtue of the nature of the position, a material adverse effect on the national security as a sensitive position at one of three sensitivity levels: Special–Sensitive, Critical–Sensitive, or Noncritical–Sensitive."

[3] As OPM recognizes, under the rule adopted by the majority, "[t]he Board's review . . . is limited to determining whether [the agency] followed necessary procedures . . . [and] the merits of the national security determinations are not subject to review." OPM Br. at 25; *see also Egan*, 484 U.S. at 530. "The Board's review does not . . . include the merits of the underlying determination that Mr. Northover and Ms. Conyers were not eligible to occupy a

majority's holding forecloses the statutorily-provided review of the merits of adverse employment actions taken against civil service employees merely because those employees occupy a position designated by the agency as a national security position.

The majority's holding allows agencies to take adverse actions against employees for illegitimate reasons, and have those decisions shielded from review simply by designating the basis for the adverse action as "ineligibility to occupy a sensitive position." As the Board points out, the principle adopted by the majority not only precludes review of the merits of adverse actions, it would also "preclude Board and judicial review of whistleblower retaliation and a whole host of other constitutional and statutory violations for federal employees subjected to otherwise appealable removals and other adverse actions." Board Br. at 35. This effect is explicitly conceded by OPM, which agrees that the agency's "liability for damages for alleged discrimination or retaliation" would not be subject to review. OPM Br. at 25.

OPM's concession is grounded in existing law since the majority expands *Egan* to cover all "national security" positions, and *Egan* has been held to foreclose whistleblower, discrimination, and other constitutional claims. Relying on *Egan*, we have held that the Board lacks jurisdiction where a petitioner alleges that his security clearance had been revoked in retaliation for whistleblowing. *See Hesse v. Dep't of State*, 217 F.3d 1372, 1377-80 (Fed. Cir. 2000), *cert. denied*, 531 U.S. 1154 (2001). So too, the majority's decision renders unreviewable all claims of discrimination by employees in national security positions under Title VII of the Civil Rights Act of 1964,

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sensitive position for national security reasons." OPM Reply Br. at 15.

42 U.S.C. § 2000e-5. Several circuits have held that courts lack jurisdiction to adjudicate discrimination claims where the adverse action is based on a security clearance revocation because "a Title VII analysis necessarily requires the court to perform some review of the merits of the security clearance decision," which is prohibited by *Egan*. *Brazil v. U.S. Dep't of the Navy*, 66 F.3d 193, 196 (9th Cir. 1995); *see Bennett v. Chertoff*, 425 F.3d 999, 1003 (D.C. Cir. 2005) ("While [the plaintiff] claims that [the agency's] security clearance explanation is pretextual, . . . a court cannot adjudicate the credibility of that claim.").[4] Indeed, in this case, Mr. Northover's discrimination claims were dismissed without prejudice pending the outcome of this appeal. Constitutional claims by employees occupying national security positions are also barred by the majority's decision despite the majority's contrary protestations. In *El-Ganayni v. U.S. Department of Energy*, 591 F.3d 176, 184-86 (3d Cir. 2010), the Third Circuit held that a plaintiff could not prevail on his First Amendment and Fifth Amendment claims where he alleged his security clearance had been revoked in retaliation for constitutionally protected speech and/or based on his religion and national origin.

[4] *See also Tenenbaum v. Caldera*, 45 F. App'x 416, 418 (6th Cir. 2002); *Ryan v. Reno*, 168 F.3d 520, 523-24 (D.C. Cir. 1999); *Becerra v. Dalton*, 94 F.3d 145, 149 (4th Cir. 1996); *Perez v. FBI*, 71 F.3d 513, 514-15 (5th Cir. 1995) ("Because the court would have to examine the legitimacy and the possibly pretextual nature of the [agency's] proffered reasons for revoking the employee's security clearance, any Title VII challenge to the revocation would of necessity require some judicial scrutiny of the merits of the revocation decision." (footnote omitted)).

II

The majority completely fails to come to grips with the statute, the fact that it provides for review of the merits of the adverse agency action involved here, and that the majority's holding effectively nullifies the statute.

The primary purpose of the CSRA—providing review of agencies' adverse employment actions—was to ensure that "[e]mployees are . . . protected against arbitrary action, personal favoritism, and from partisan political coercion." S. Rep. No. 95-969, at 19 (1978), *reprinted in* 1978 U.S.C.C.A.N. 2723, 2741. In order to ensure such protection, the CSRA created the Board to be "a quasi-judicial body, empowered to determine when abuses or violations of law have occurred, and to order corrective action." *Id.* at 24. The protections were afforded to the vast majority of employees of the executive branch.

Subchapter II of Chapter 75 of the CSRA explicitly gives every "employee" the right to seek Board review of adverse employment actions. 5 U.S.C. § 7513(d); *see also id.* § 7701. The term "employee" is defined to include all employees in the competitive or excepted services[5] who are not serving a probationary period or under temporary

[5] The "competitive service" consists of "all civil service positions in the executive branch" with the exception of those positions that are specifically exempted by statute, those positions which are appointed for confirmation by the Senate (unless included by statute), and those positions that are in the Senior Executive Service; other civil service positions that have been "specifically included in the competitive service by statute"; and "positions in the government of the District of Columbia which are specifically included in the competitive service by statute." 5 U.S.C. § 2102(a). The "excepted service" consists of all "civil service positions which are not in the competitive service or the Senior Executive Service." *Id.* § 2103(a).

appointment, and who, in the case of excepted service employees, has completed two years of specified service.[6] An employee is entitled to appeal "a removal," "a suspension for more than 14 days," "a reduction in grade" or pay, or "a furlough of 30 days or less" to the Board. *Id.* § 7512.

In order to determine whether an adverse action constitutes arbitrary agency action, the Board necessarily examines the merits of the underlying agency decision.[7]

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[6] The statute defines an "employee" as:

(A) an individual in the competitive service--
(i) who is not serving a probationary or trial period under an initial appointment; or
(ii) who has completed 1 year of current continuous service under other than a temporary appointment limited to 1 year or less;

(B) a preference eligible in the excepted service who has completed 1 year of current continuous service in the same or similar positions--
(i) in an Executive agency; or
(ii) in the United States Postal Service or Postal Regulatory Commission; and

(C) an individual in the excepted service (other than a preference eligible)--
(i) who is not serving a probationary or trial period under an initial appointment pending conversion to the competitive service; or
(ii) who has completed 2 years of current continuous service in the same or similar positions in an Executive agency under other than a temporary appointment limited to 2 years or less . . . .

5 U.S.C. § 7511(a)(1).

[7] *See Adams v. Dep't of the Army*, 105 M.S.P.R. 50, 55 (2007), *aff'd*, 273 F. App'x 947 (Fed. Cir. 2008) ("[W]hen the charge consists of the employing agency's withdrawal or revocation of its certification or other approval of the employee's fitness or other qualifications to hold his position, the Board's authority generally

Under 5 U.S.C. § 7513, an agency may take an adverse employment action against an employee "only for such cause as will promote the efficiency of the service." *Id.* § 7513(a). In order to demonstrate that the adverse action will promote the efficiency of the service, "the agency must show by preponderant evidence that there is a nexus between the misconduct and the work of the agency, i.e., that the employee's misconduct is likely to have an adverse impact on the agency's performance of its functions." *Brown v. Dep't of the Navy*, 229 F.3d 1356, 1358 (Fed. Cir. 2000). In evaluating whether the agency has satisfied the nexus requirement, "[t]he Board routinely evaluates such factors as loyalty, trustworthiness, and judgment in determining whether an employee's discharge will promote the efficiency of the service." *James v. Dale*, 355 F.3d 1375, 1379 (Fed. Cir. 2004) (quoting *Egan*, 484 U.S. at 537 n.1 (White, J., dissenting)). This merits evaluation is not modified merely because the removal is cloaked under the cloth of being "in the interests of national security."

The decision by Congress to afford such review to the great majority of federal employees is made clear from the history of the CSRA. Initially, review of adverse actions was extended only to preference eligibles.[8] *See United States v. Fausto*, 484 U.S. 439, 444 (1988). In 1978, Subchapter II of Chapter 75 of the CSRA was enacted to extend protections to employees in the competitive service in addition to preference eligibles, but generally not to employees in the excepted service. *See* Civil Service

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extends to a review of the merits of that withdrawal or revocation.").

[8] A "preference eligible" generally includes veterans discharged under honorable conditions, disabled veterans, and certain family members of deceased or disabled veterans. *See* 5 U.S.C. § 2108(3).

Reform Act of 1978, Pub. L. No. 95-454, § 204(a), 92 Stat. 1111. In *United States v. Fausto*, 484 U.S. at 444, 455, the Supreme Court held that the CSRA did not cover non-preference eligible excepted service employees and that such employees could also not seek review of an adverse action in a suit for back pay in what is now the United States Court of Federal Claims.

In 1990, in response to *Fausto*, Congress expanded the CSRA to apply to all federal government employees in the competitive and excepted services with narrow exceptions (discussed below). *See* Civil Service Due Process Amendments, Pub. L. No. 101-376, 104 Stat. 461 (1990). In expanding the CSRA's reach to include employees in the excepted service, Congress recognized that "no matter how an employee is initially hired, that employee acquires certain expectations about continued employment with the Government. . . . [Excepted service employees] should have the same right to be free from arbitrary removal as do competitive service employees." H.R. Rep. No. 101-328, at 4 (1989), *reprinted in* 1990 U.S.C.C.A.N. 695, 698.

Both Ms. Conyers and Mr. Northover held permanent positions in the competitive service and both had completed more than one year of "current continuous service under other than a temporary appointment." Thus, both fall squarely within the definition of "employee" under the statute. Ms. Conyers was indefinitely suspended and Mr. Northover was reduced in grade, both adverse actions which entitle them to seek Board review. Thus, the Board had jurisdiction over both Ms. Conyers's and Mr. Northover's appeals.

That Congress clearly intended that Board review extend to these employees is made apparent by Congress's decision to craft specific exceptions to Board jurisdiction where national security was a concern, and not to extend

such exceptions to the positions involved here. In expanding the CSRA's coverage to excepted service employees in 1990, Congress created exceptions for specified employees based on national security concerns. Congress excluded particular government agencies, such as the FBI and the National Security Agency ("NSA"), "because of their sensitive missions," and also recognized that other agencies, such as the CIA, had already been specifically excluded from the CSRA by separate statute. *Id.* at 5. In 1996, the exceptions were expanded to cover all "intelligence component[s] of the Department of Defense."[9] 5 U.S.C. § 7511(b).

Congress's decision to specifically exempt certain national security positions from the protections of the CSRA provides strong evidence that it intended that Board review extend to other positions classified as national security positions that were not exempted. As the Supreme Court noted in *United States v. Brockamp*, 519

[9] The 1990 amendment originally excluded *inter alia* "the National Security Agency [and] the Defense Intelligence Agency" from Chapter 75 of the CSRA. Pub. L. No. 101-376, § 2. However, in 1996, Congress eliminated this language and replaced it with "an intelligence component of the Department of Defense." Pub. L. No. 104-201, § 1634(b), 110 Stat. 2422 (1996). The current version of the statute contains this language. *See* 5 U.S.C. § 7511(b). An "intelligence component of the Department of Defense" includes the NSA, the Defense Intelligence Agency, the National Geospatial-Intelligence Agency, and "[a]ny other component of the Department of Defense that performs intelligence functions and is designated by the Secretary of Defense as an intelligence component of the Department of Defense." 10 U.S.C. § 1614(2). Neither the Defense Finance and Accounting Service (where Ms. Conyers was employed), nor the Defense Commissary Agency (where Mr. Northover was employed) is an "intelligence component of the Department of Defense."

U.S. 347, 352 (1997), an "explicit listing of exceptions . . . indicate[s] to us that Congress did not intend courts to read other unmentioned . . . exceptions into the statute that it wrote." *See also TRW Inc. v. Andrews*, 534 U.S. 19, 28 (2001) ("Where Congress explicitly enumerates certain exceptions . . . additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent." (quoting *Andrus v. Glover Constr. Co.*, 446 U.S. 608, 616-17 (1980)). The governing principle is simple enough. Where Congress has crafted some exceptions for national security and not others, employees are entitled to Board review of the merits of adverse employment actions, regardless of the Department of Defense's or the majority's views that additional exceptions for national security positions would be desirable. Significantly too, in enacting 5 U.S.C. § 7532,[10] Congress provided an alternative mechanism to bypass the Board for national security purposes—an alternative not invoked here.

The majority contends that Congress's decision to exempt the FBI, CIA, and intelligence components of the Department of Defense based on national security concerns is "speculative because 'national security' was not a factor providing for these exclusions." Majority Op. at 12

[10] Under section 7532, "the head of an agency may suspend without pay an employee of his agency when he considers that action necessary in the interests of national security." 5 U.S.C. § 7532(a). "[T]he head of an agency may remove an employee [who has been] suspended . . . when, after such investigation and review as he considers necessary, he determines that removal is necessary or advisable in the interests of national security. The determination of the head of the agency is final." *Id.* § 7532(b). Although the agency may summarily remove an employee under section 7532, that section also provides for certain procedural protections to an employee before he or she can be removed. *See id.* § 7532(c).

n.8. The majority is clearly mistaken, as both the language and the legislative history of the exemptions created for these agencies demonstrate that these exemptions were specifically granted based on the potential impact that employees in these agencies could have on national security.

Adverse actions taken against CIA employees are governed by 50 U.S.C. § 403-4a, which was originally enacted pursuant to the National Security Act of 1947, Pub. L. No. 80-253, § 102(c), 61 Stat. 495, 498. In enacting the National Security Act of 1947, Congress acknowledged that one of the central purposes of the Act was to "establish[] a structure fully capable of safeguarding *our national security promptly and effectively*." S. Rep. No. 80-239, at 2 (1947) (emphasis added). To that end, Congress provided the Director of the CIA plenary authority to "terminate the employment of any officer or employee of the [CIA] whenever he shall deem such termination necessary or advisable in the interests of the United States." Pub. L. No. 80-253, § 102(c); *see also* 50 U.S.C. § 403-4a(e)(1).

In 1964, Congress crafted a similar exemption for employees of the NSA, modeling it after that created for the CIA in 1947. *See* Act of Mar. 26, 1964, Pub. L. No. 88-290, § 303(a), 78 Stat. 168, 169. In providing this exemption, Congress explicitly recognized that "[t]he responsibilities assigned to the [NSA] are so great, and the consequences of error so devastating, that authority to deviate from a proposed uniform loyalty program for Federal employees should be granted to this Agency." S. Rep. No. 88-926, at 2 (1964). Congress also noted that the exemption "recognizes the principle that the responsibility for control of those persons who are to have access to highly classified information should be accompanied by commensurate authority to terminate their employment when their

retention and *continued access to extremely sensitive information is not clearly consistent with the national security*." *Id.* (emphasis added).

When Congress expanded Chapter 75 to cover employees in the excepted service in 1990, it continued to exclude the FBI, CIA, and NSA, acknowledging that "[t]he National Security Act of 1946 [sic] provides the Director of the [CIA] with plenary authority to deal with personnel of the CIA," and explained that it had "preserved the status quo in relation to the FBI and NSA *because of their sensitive missions*." *See* H.R. Rep. No. 101-328, at 5 (emphasis added). In 1996, Congress passed the National Defense Authorization Act for Fiscal Year 1997, Pub. L. No. 104-201, 110 Stat. 2422 (1996), creating a new exemption for all "intelligence components of the Department of Defense," *id.* §§ 1632-33. This exemption is codified at 10 U.S.C. §§ 1609 and 1612, which explicitly provide the Secretary of Defense with authority to take adverse action against certain employees where "the procedures prescribed in other provisions of law [i.e. the provisions of Chapter 75] . . . cannot be invoked in a manner *consistent with the national security*." 10 U.S.C. § 1609(a)(2) (emphasis added); *see also id.* § 1612 ("Notwithstanding any provision of chapter 75 of title 5, an appeal of an adverse action by an individual employee . . . shall be determined within the Department of Defense."). Thus, that Congress intended to exclude these agencies from the protections of Chapter 75 for national security reasons is undeniable.

The majority also appears to argue that Congress's decision to craft other exemptions for employees of other government agencies is somehow inconsistent with the notion that Congress's exclusion of the FBI, CIA, and NSA was for national security reasons. However, Congress, in enacting the CSRA, excluded certain non-intelligence agencies, such as the General Accounting

Office, the Veterans Health Sciences and Research Administration, the Postal Service, the Postal Rate Commission, and the Tennessee Valley Authority because the employees of these agencies were already provided with appeal rights through alternative mechanisms. *See* H.R. Rep. No. 101-328, at 5.

Finally, if Congress's legislative creation of certain exemptions based upon national security concerns were not enough to refute the majority's construction, there has also been an express decision by Congress to deny the national security exemptions claimed here by the Department of Defense for its non-intelligence components. In 2003, Congress enacted legislation that allowed the Department of Defense to exclude employees holding national security positions from the review procedures provided by Chapter 75 of the CSRA. *See* National Defense Authorization Act for Fiscal Year 2004, Pub. L. No. 108-136, § 1101, 117 Stat. 1392 (2003). This legislation provided that the Secretary may "establish . . . a human resources management system [the National Security Personnel System ("NSPS")] for *some or all* of the *organizational or functional units* of the Department of Defense." *Id.* § 1101(a) (codified at 5 U.S.C. § 9902(a)) (emphasis added). Among other things, the Secretary was permitted to promulgate regulations to "establish an appeals process that provides employees . . . fair treatment in any appeals that they bring in decisions relating to their employment." *Id.* (codified at 5 U.S.C. § 9902(h)(1)(A)). Following the Secretary's promulgation of such regulations, "[l]egal standards and precedents applied before the effective date of [the NSPS] by the [Board] and the courts under chapters 43, 75, and 77 of [the CSRA] shall apply to employees of organizational and functional units included in the [NSPS], *unless such standards and precedents are inconsistent with legal*

standards established [by the Secretary]." *Id.* (codified at 5 U.S.C. § 9902(h)(3)) (emphasis added). In other words, the Secretary's regulations could bar review by the Board.

Pursuant to the statutory authorization, the Secretary promulgated regulations that in fact limited the Board's authority. *See* Department of Defense Human Resources Management and Labor Relations Systems, 70 Fed. Reg. 66,116 (Nov. 1, 2005). Under the regulations, "[w]here it is determined that the initial [Board] decision has a direct and substantial adverse impact on the Department's national security mission, . . . a final [Department of Defense] decision will be issued modifying or reversing that initial [Board] decision." *Id.* at 66,210 (codified at 5 C.F.R. § 9901.807(g)(2)(ii)(B)). Thus, a Board decision reversing an agency's adverse action was subject to veto by the agency if it was determined to have "a direct and substantial adverse impact on the Department's national security mission"—a less draconian version of the agency authority asserted here. Also, under the regulations, if the Secretary determined "in his or her *sole, exclusive, and unreviewable discretion* [that an offense] has a direct and substantial adverse impact on the Department's national security mission," *id.* at 66,190 (codified at 5 C.F.R. § 9901.103) (emphasis added), the Board could not mitigate the penalty for such an offense, *id.* at 66,210 (codified at 5 C.F.R. § 9901.808(b)).

On January 28, 2008, Congress amended the NSPS statute to eliminate the Department of Defense's authority to create a separate appeals process and invalidate the existing regulations limiting Board authority established by the Secretary, *see* National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181, § 1106(a), (b)(3), 122 Stat. 3, 349, 356-57, bringing the "NSPS under Governmentwide rules for disciplinary actions and employee appeals of adverse actions," National Security

Personnel System, 73 Fed. Reg. 56,344, 56,346 (Sept. 26, 2008).[11] The repeal of the Department of Defense's authority to create a separate appeals process (exempting employees from Board review) and the repeal of Secretary's regulations implementing this appeals process demonstrate conclusively that Congress intended to preclude the Department of Defense from insulating adverse employment decisions as to employees of non-intelligence components from Board review on the merits.

The majority's argument to the contrary is unconvincing. The majority is incorrect in suggesting that the repeal of these provisions was due to concerns about collective bargaining. *See* Majority Op. at 12 n.8. In fact, the provisions of the NSPS limiting collective bargaining were addressed in a 2008 amendment to a separate provision in response to litigation brought by labor organizations on behalf of Department of Defense employees.[12] *See Am. Fed'n of Gov't Emps., AFL-CIO v. Gates*, 486 F.3d 1316 (D.C. Cir. 2007). The 2008 amendment to the collective bargaining provisions had nothing to do with the repeal of the Chapter 75 exemption authority or the repeal of the regulations restricting adverse action appeal rights. As the Department of Defense itself noted, the restoration of adverse action appeal rights to its

[11] The remaining statutory provisions creating the NSPS were ultimately repealed on October 28, 2009. *See* National Defense Authorization Act for Fiscal Year 2010, Pub. L. No. 111-84, § 1113(b), 123 Stat. 2190, 2498 (2009); *see also* National Security Personnel System, 76 Fed. Reg. 81,359 (Dec. 28, 2011) (repealing regulations implementing the NSPS effective January 1, 2012).

[12] The provisions of the NSPS concerning collective bargaining were contained in subsection (m) of 5 U.S.C. § 9902, whereas the provisions relating to adverse action appeal rights were contained in subsection (h), and had nothing to do with collective bargaining.

employees was designed to "[b]ring[] NSPS under Governmentwide rules for disciplinary actions and employee appeals of adverse actions." National Security Personnel System, 73 Fed. Reg. at 56,346. The Department of Defense cannot now claim authority specifically denied by Congress.

III

The majority suggests that cases such as *Dames & Moore v. Regan*, 453 U.S. 654 (1981), and *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), recognizing the existence of Presidential authority to act even when Congress has not, support the agency action here. *See* Majority Op. at 13. There are three serious flaws with this argument. First, as the majority itself recognizes, the President cannot act contrary to congressional legislation except perhaps in the most unusual circumstances—which are not claimed to exist here.[13] As described immediately above, Congress has acted to provide for Board review.

Second, this case does not involve a Presidential action. *Dames* and *Youngstown* both involved agency action taken pursuant to an Executive Order of the President. *See Dames*, 453 U.S. at 662-63 (Executive Order authorized the Secretary of the Treasury to promulgate regulations to block the removal or transfer of all property held by the government of Iran); *Youngstown*, 343 U.S. at 582-83 (Executive Order directed the Secretary of Commerce to seize the nation's steel mills). The only Executive

[13] *See Youngstown*, 343 U.S. at 637 (Jackson, J., concurring) ("When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter.").

Orders that are potentially relevant here are Executive Order No. 12,968, 60 Fed. Reg. 40,245, and Executive Order No. 10,450, 18 Fed. Reg. 2489. Neither grants the agency the authority it now seeks.

Executive Order No. 12,968, prior versions of which formed the basis for *Egan*, relates exclusively to "access to classified information." It delegates to the heads of executive agencies the responsibility to "establish[] and maintain[] an effective program to ensure that access to classified information by each employee is clearly consistent with the interests of the national security," and sets forth the conditions under which employees may be granted access to classified information. Exec. Order No. 12,968, § 1.2(b)-(e), 60 Fed. Reg. at 40,246-47. It provides that an agency's decision to revoke an employee's security clearance shall be "final." *Id.* § 5.2(b). Executive Order No. 12,968 has nothing to do with this case because the agency's adverse employment actions against Ms. Conyers and Mr. Northover were not based on denials of eligibility to access classified information, and neither position involved in this case required a security clearance or access to classified information.

Executive Order No. 10,450 provides that the heads of government agencies and departments "shall be responsible for establishing and maintaining within [their] department or agency an effective program to insure that the employment and retention in employment of any civilian officer or employee within the department or agency is clearly consistent with the interests of the national security." Exec. Order No. 10,450, § 2, 18 Fed. Reg. at 2489. The order also delegates to agencies the authority to determine investigative requirements for positions "according to the degree of adverse effect the occupant of the position . . . could bring about . . . on the national security." *Id.* § 3; *see also* 5 C.F.R. § 732.201

(setting forth the three levels of sensitivity). Nothing in the order in any way suggests that those falling into a sensitive category should be exempt from Board review. Rather, the order provides for the alternative removal mechanism provided in section 7532. Where an agency head determines that continued employment of an employee is not "clearly consistent with the interests of the national security," the agency head "shall immediately suspend the employment of the person involved if he deems such suspension necessary in the interests of the national security and, following such investigation and review as he deems necessary, the head of the department or agency concerned shall terminate the employment of such suspended officer or employee whenever he shall determine such termination necessary or advisable in the interests of the national security, in accordance with the said act of August 26, 1950."[14] *Id.* § 6. As the Supreme Court previously noted, "it is clear from the face of the Executive Order that *the President did not intend to override statutory limitations on the dismissal of employ-*

[14] The Act of Aug. 26, 1950, Pub. L. No. 81-733, 64 Stat. 476, was the predecessor to 5 U.S.C. § 7532. It provided:

> [N]otwithstanding . . . the provisions of any other law, [designated agency head] may, in his absolute discretion and when deemed necessary in the interest of national security, suspend, without pay, any civilian officer or employee of the [agency] . . . . The agency head concerned may, following such investigation and review as he deems necessary, terminate the employment of such suspended civilian officer or employee whenever he shall determine such termination necessary or advisable in the interest of the national security of the United States, and such determination by the agency head concerned shall be conclusive and final.

ees, and promulgated the Order solely as an implementation of the 1950 Act," i.e., what is now 5 U.S.C. § 7532. *Cole v. Young*, 351 U.S. 536, 557 n.20 (1956) (emphasis added). The "statutory limitations" in question in *Cole* required review of adverse employment actions with respect to those employees enjoying veterans' preference rights, and served as the predecessor of the current Chapter 75 which protects federal civil service employees generally. *See* Veterans' Preference Act of 1944, ch. 287, 58 Stat. 387, 390-91.[15] If Executive Order No. 10,450 did not override the earlier limited protections, it can hardly be read to override the later-enacted expanded protections in the current CSRA. Thus, neither Executive Order No. 12,968 nor Executive Order No. 10,450 authorizes agencies to insulate adverse employment actions from Board review where the employees occupy a national security position, outside the context of security clearance revocations or actions under section 7532—neither of which exists here.

Third, neither *Dames* nor *Youngstown* supports *agency* (as opposed to Presidential) action independent of congressional authorization. An agency cannot administratively create authority for agency action. "Agencies are created by and act pursuant to statutes." *Elgin v. Dep't of the Treasury*, 132 S. Ct. 2126, 2136 n.5 (2012). An agency may not act "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right." 5 U.S.C. § 706. Agencies "act[] as a delegate to the legislative power," and

[15] Prior to enactment of the CSRA in 1978, "only veterans enjoyed a statutory right to appeal adverse personnel action to the Civil Service Commission (CSC), the predecessor of the MSPB." *Fausto*, 484 U.S. at 444; *see also* 5 U.S.C. § 7701 (1976) ("A preference eligible employee . . . is entitled to appeal to the Civil Service Commission from an adverse decision . . . of an administrative authority so acting.").

"[a]n agency may not finally decide the limits of its statutory power. That is a judicial function." *Social Sec. Bd. v. Nierotko*, 327 U.S. 358, 369 (1946). As the Supreme Court noted in *Ernst & Ernst v. Hochfelder*, even where an agency has been given the authority to fill gaps in the statute, "[t]he rulemaking power granted to an administrative agency charged with the administration of a federal statute is not the power to make law. Rather, it is the power to adopt regulations to carry into effect the will of Congress as expressed by the statute." 425 U.S. 185, 213-14 (1976) (internal quotation marks omitted); *see also Addison v. Holly Hill Fruit Prods., Inc.*, 322 U.S. 607, 616 (1944) ("The determination of the extent of authority given to a delegated agency by Congress is not left for the decision of him in whom authority is vested."). Where, as here, Congress has not authorized the agency to limit Board review of its decisions, and has indeed revoked such authorization, the agency acts in excess of its statutory authority.

IV

The majority contends that the Supreme Court's decision in *Department of the Navy v. Egan*, 484 U.S. 518, supports the exemption of all national security positions from Board jurisdiction over the merits of adverse actions. Majority Op. at 10-12. However, the Supreme Court itself made clear that *Egan*'s holding is limited to addressing the "*narrow* question" of "whether the [Board] has authority by statute to review the substance of an underlying decision to *deny or revoke a security clearance* in the course of reviewing an adverse action." *Egan*, 484 U.S. at 520 (emphasis added). Indeed, every other circuit that has considered *Egan* has uniformly interpreted it as

relating to security clearance determinations.[16] The *Egan* Court treated the revocation or denial of a security clearance as a failure to satisfy a job qualification where determinations as to underlying basis for the qualification—whether a security clearance should be granted—had been constitutionally committed to the discretion of another party—the President. *See id.* at 520 ("[A] condition precedent to Egan's retention of his employment was 'satisfactory completion of security and medical reports.'"); *id.* at 522 ("Without a security clearance, respondent was not eligible for the job for which he had been hired."); *see also id.* at 527 ("The authority to protect [classified] information falls on the President as head of the Executive Branch and as Commander in Chief.").

Where an employee fails to satisfy a qualification required for a position and the determination as to whether the employee is eligible for the qualification is committed to the discretion of a third party, it is unsurprising that the Board's inquiry is limited to whether the job was

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[16] *See, e.g.*, *Rattigan v. Holder*, No. 10-5014, 2012 WL 2764347, at *3 (D.C. Cir. July 10, 2012) ("*Egan*'s absolute bar on judicial review covers only security clearance-related decisions made by trained Security Division personnel . . . ."); *Zeinali v. Raytheon Co.*, 636 F.3d 544, 549-50 (9th Cir. 2011) ("The core holding[] of Egan . . . [is] that federal courts may not review the merits of the executive's decision to grant or deny a security clearance."); *Makky v. Chertoff*, 541 F.3d 205, 213 (3d Cir. 2008) ("[Courts] have jurisdiction to review [claims that] do[] not necessarily require consideration of the merits of a security clearance decision."); *Duane v. U.S. Dep't of Defense*, 275 F.3d 988, 993 (10th Cir. 2002) ("*Egan* held that the Navy's substantive decision to revoke or deny a security clearance-along with the factual findings made by the AJ in reaching that decision-was not subject to review on its merits by the Merit Systems Protection Board.").

conditioned on a particular qualification and whether the employee's qualifying status had been revoked. *See id.* at 530. In this vein, the Board has held that it lacks authority to evaluate the merits of a decision to revoke an attorney's bar license, or an employee's reserve membership, where such license or membership is required for a particular government position. *See, e.g., Buriani v. Dep't of the Air Force*, 777 F.2d 674, 677 (Fed. Cir. 1985) (holding that the Board should not examine the merits of the Air Force's decision to remove an employee from reserve membership); *McGean v. NLRB*, 15 M.S.P.R. 49, 53 (1983) (holding that "the Board is without authority to review the merits" of a decision to suspend an attorney's membership in the Bar).[17]

Contrary to the majority, *Egan* turned solely on the President's constitutional "authority to classify and control *access to information* bearing on national security

[17] *See Williams v. U.S. Postal Serv.*, 35 M.S.P.R. 581, 589 (1987) ("[T]he Board's refusal to examine reasons for bar decertification where the employee is removed for failure to maintain bar membership is firmly grounded in its refusal to collaterally attack the decision of another tribunal, statutorily charged with the authority to render the decision under review. . . . The Board also affords discretion to the military on matters peculiarly within its expertise because '[t]he military constitutes a specialized community governed by a separate discipline from that of the civilian' and it is not within the role of the judiciary to intervene in the orderly execution of military affairs." (quoting *Orloff v. Willoughby*, 345 U.S. 83, 94 (1953))); *see also Christofili v. Dep't of the Army*, 81 M.S.P.R. 384, 392 (1999) ("It is well-settled that the regulation of the practice of law and the discipline of members of a state bar is exclusively a state court matter."); *Egan v. Dep't of the Navy*, 28 M.S.P.R. 509, 518 (1985) ("In all these contexts, the underlying actions, *i.e.*, termination of reserve status . . . and bar decertification, are committed to appropriate procedures within the respective entities . . . .").

and to determine whether an individual is sufficiently trustworthy to occupy a position in the Executive Branch that will give that person *access to such information*." 484 U.S. at 527 (emphasis added). Just as the authority to revoke an attorney's bar license or a military member's reserve status lies with an expert third party (the highest court of a state or the military), the authority to protect classified information "falls on the President as head of the Executive Branch and as Commander in Chief." *Id.* As the Supreme Court noted, Presidents have exercised such authority through a series of Executive Orders. *Id.* at 528 (citing Executive Orders); *see also* Exec. Order No. 12,968, 60 Fed. Reg. 40,245. As noted, those Executive Orders provide that the agency decision to revoke a security clearance shall be "final." As discussed above, no similar Executive Order purporting to make the agency decision "final" exists here. Contrary to the majority, *Egan* has been uniformly treated as limited only to limiting review of the underlying merits of the Executive Branch's decision to revoke or deny a security clearance, and has not been expanded to apply to all conduct that may have the potential to impact national security. *See, e.g., Bennett*, 425 F.3d at 1002 ("[T]he two determinations [suitability for federal employment and eligibility for security clearance] are subject to different processes of review: whereas suitability determinations are subject to appeals to the Merit Systems Protection Board and subsequent judicial review, security clearance denials are subject to appeal within the agency." (internal citations omitted)).[18] *Egan* itself recognized that national security

[18] *See also, e.g., Jacobs v. Dep't of the Army*, 62 M.S.P.R. 688, 695 (1994) ("The Supreme Court's decision in *Egan* was narrow in scope and specifically applied only to security clearance revocations."); *Cosby v. Fed. Aviation Admin.*, 30 M.S.P.R. 16, 18 (1986) ("*Egan* addresses only those adverse actions which are based substantially on an

employees can otherwise challenge adverse employment actions before the Board, such that Egan's "removal . . . presumably would be subject to Board review as provided in § 7513." 484 U.S. at 523 n.4. In this case, Ms. Conyers and Mr. Northover were not required to have a security clearance in order to hold their respective positions. Thus, *Egan* is inapplicable.

The majority's reliance on *Carlucci v. Doe*, 488 U.S. 93 (1988), is also misplaced. Unlike the employees here, the NSA employee in *Carlucci* had been specifically exempted from the provisions of the CSRA providing for Board review of adverse actions. *See id.* at 96; *see also* 10 U.S.C. § 1612(3) (providing that appeals of such adverse actions must take place exclusively within the Department of Defense pursuant to procedures prescribed by the Secretary).

* * *

In summary, Congress's decision is clear—with the exception of designated agencies such as the CIA, FBI, and intelligence components of the Department of Defense, employees may challenge the merits of adverse actions before the Board. At the same time Congress has provided a safety valve in section 7532, allowing the agencies to summarily remove employees "when, after such investigation and review as [the agency head] considers necessary, he determines that removal is necessary or advisable in the interests of national security." 5 U.S.C. § 7532(b). It is not the business of the Department of Defense, the Office of Personnel Management, or this court to second-guess the congressional decision to provide Board review. I respectfully dissent.

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agency's revocation or denial of an employee's security clearance.").

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2010 MSPB 247

Docket Nos. CH-0752-09-0925-I-1
CH-0752-09-0925-I-2

Rhonda K. Conyers,

Appellant,

v.

Department of Defense,

Agency.

December 22, 2010

Andres M. Grajales, Esquire, Washington, D.C., for the appellant.

Cynthia C. Cummings, Esquire, Columbus, Ohio, and Frank M. Yount, Esquire, Indianapolis, Indiana, for the agency.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman
Mary M. Rose, Member
Member Rose issues a dissenting opinion.

OPINION AND ORDER

¶1 This appeal is before the Board on interlocutory appeal from the administrative judge's February 17, 2010 order. The administrative judge stayed the proceedings and certified for Board review her ruling that she would not apply the limited scope of Board review set forth in *Department of the Navy v. Egan*, 484 U.S. 518, 530-31 (1988), in adjudicating the appellant's indefinite suspension. For the reasons discussed below, we AFFIRM the administrative judge's ruling AS MODIFIED by this Opinion and Order, VACATE the stay

order, and RETURN the appeal to the administrative judge for further adjudication consistent with this Opinion and Order.

BACKGROUND[1]

¶2 Effective September 11, 2009, the agency indefinitely suspended the appellant from the competitive service position of GS-525-05 Accounting Technician at the Defense Finance and Accounting Service (DFAS).[2] Initial Appeal File (IAF), Tab 5, Subtabs 4i, 4j. The agency took the action because the appellant had been "denied eligibility to occupy a sensitive position by [the agency's] Washington Headquarters Services (WHS) Consolidated Adjudications Facility (CAF), and we are awaiting a decision on your appeal of the CAF's denial from the Defense Office of Hearing and Appeals (DOHA) Administrative Judge."[3] *Id.*, Subtab 4i at 1. The agency stated that the appellant's position required her to have access to sensitive information, the WHS/CAF had denied her such access, and therefore she did not meet a qualification requirement of her position. *Id.* In its notice of proposed indefinite suspension, the agency stated that the reason for the proposal was the WHS/CAF's decision to deny the

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[1] In deciding this interlocutory appeal, we have relied on the current evidentiary record, the undisputed allegations of the parties, and the parties' stipulations. Because the record is not fully developed, the administrative judge should reopen the record when deciding the appeal. Except for the parties' stipulations, she may reexamine any factual matter mentioned in this Opinion and Order. *See, e.g., Olson v. Department of Veterans Affairs*, 92 M.S.P.R. 169, ¶ 2 n.1 (2002).

[2] The appellant was a permanent employee with a service computation date of September 3, 1985. Initial Appeal File, Tab 5, Subtab 4j.

[3] The record indicates that the DOHA administrative judge issued a recommendation in the appellant's favor, but that on September 15, 2009, the Clearance Appeal Board did not accept the recommendation and denied her appeal. IAF, Tab 10, Ex. A. The agency subsequently removed the appellant effective February 19, 2010. Petition For Review (PFR) File, Tab 25, Ex. 1. The Board denied the appellant's motion to incorporate her removal into this appeal. *Id.*, Tab 32.

appellant "eligibility for access to sensitive or classified information." IAF, Tab 5, Subtab 4g.

¶3 The appellant filed an appeal of her indefinite suspension. IAF, Tab 1. In responding to the appeal, the agency stated that the appellant's position had been designated non-critical sensitive (NCS) under the Department of Defense Personnel Security Program Regulation, that her position required her to access "sensitive or classified information," and that, under *Egan*, the Board cannot review the merits of the WHS/CAF's decision to deny her eligibility for access "to sensitive or classified information and/or occupancy of a sensitive position."[4] *Id.*, Tab 5, Subtab 1 at 1-2, 5-6.

¶4 On February 17, 2010, the administrative judge issued an Order Granting Motion for Certification of Interlocutory Appeal and Staying Proceeding. IAF 2, Tab 4 at 2. The administrative judge stated that she had "informed the parties that [she] would decide the case under the broader standard applied in *Adams* [*v. Department of the Army*, 105 M.S.P.R. 50 (2007), *aff'd*, 273 F. App'x 947 (Fed. Cir. 2008)] and other [5 U.S.C.] Chapter 75 cases which do not involve security clearances;" that the agency moved to certify this ruling for interlocutory appeal;[5] and that the regulatory requirements for certifying her ruling had been satisfied.

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[4] The administrative judge subsequently issued a January 13, 2010 initial decision dismissing the appeal without prejudice. IAF, Tab 13. The appellant filed a petition for review of the initial decision, PFR File, Tab 2, but the administrative judge docketed her January 13, 2010 initial decision as the appellant's refiled appeal, IAF 2, Tab 1, thereby mooting the petition for review.

[5] For the first time at oral argument, and then again in its closing brief, the agency asserts that it did not request an interlocutory appeal. Transcript (Tr.) at 23; PFR File, Tab 43 at 3. However, the February 17, 2010 Order expressly noted that the administrative judge was granting the *agency's motion* to certify the issue for interlocutory appeal. IAF 2, Tab 4 at 2. The agency did not dispute the administrative judge's characterization of the origin of this interlocutory appeal until over seven months later at oral argument in this matter. In any event, as we explain below, we find that the administrative judge properly certified her ruling for interlocutory appeal.

She therefore granted the agency's motion and stayed proceedings pending the Board's resolution of the certified ruling. *Id.* at 2.

¶5 The Board found that this interlocutory appeal presented the same legal issue as that presented by the interlocutory appeal in *Northover v. Department of Defense*, MSPB Docket No. AT-0752-10-0184-I-1. The Board determined that, before deciding these appeals, it was appropriate to permit the Office of Personnel Management (OPM) and interested amici to express their views on the issue. The Board therefore asked OPM to provide an advisory opinion interpreting its regulations in 5 C.F.R. Part 732, National Security Positions. PFR File, Tab 1. In doing so, the Board stated that the appellant occupied a position that the agency had designated NCS pursuant to 5 C.F.R. § 732.201(a), *id.* at 1, and that the appeal "raise[d] the question of whether, pursuant to 5 C.F.R., Part 732, National Security Positions, the rule in *Egan* also applies to an adverse action concerning a [NCS] position due to the employee having been denied continued eligibility for employment in a sensitive position," *id.* at 2. The Board also issued a notice of opportunity to file amicus briefs in these appeals. 75 Fed. Reg. 6728 (Feb. 10, 2010). OPM submitted an advisory opinion and a supplementary letter, five amici submitted briefs,[6] and the parties submitted additional argument. PFR File, Tabs 4-8, 10, 15-17.

¶6 On September 21, 2010, the Board held oral argument in *Conyers* and *Northover*.[7] The Board heard argument from the appellants' representative, the

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[6] The five amici are the American Federation of Government Employees, which also represents the appellant; the National Treasury Employees Union; the National Employment Lawyers Association/Metropolitan Washington Employment Lawyers Association; the Equal Employment Opportunity Commission; and the Government Accountability Project. PFR File, Tabs 4-8.

[7] The agency submitted several motions to dismiss the appeal as moot, which were opposed by the appellant. The Board denied these motions on the basis that the agency failed to meet the criteria for finding the appeal moot. PFR File, Tabs 25, 31-32, 35-37. While continuing to so argue, *id.*, Tab 43, Br. at 1 n.1, the agency has nevertheless failed to demonstrate that this appeal is moot for the reasons the Board explained in its

agency's representatives, and representatives for the amici from the Government Accountability Project and the National Treasury Employees Union.[8] The Board allowed the parties and amici to submit written closing arguments by October 5, 2010. Tr. at 79; PFR File, Tab 40. The parties, the National Treasury Employees Union, and the Government Accountability Project submitted closing arguments. PFR File, Tabs 41-43, 45-46. In addition, on October 5, 2010, the Office of the Director of National Intelligence (ODNI), Office of General Counsel requested an opportunity to file an "advisory opinion," *id.*, Tab 44, and the Board granted ODNI an opportunity to submit a statement presenting its position, *id.*, Tab 47. The Board also provided the parties and amici with an opportunity to reply to ODNI's filing. *Id.* ODNI filed a statement and the appellant filed a response to the statement. *Id.*, Tabs 48, 49. The record closed on October 25, 2010. *Id.*, Tab 47. The Board has considered the entire record in ruling on this interlocutory appeal.

ANALYSIS

The administrative judge properly certified her ruling for review on interlocutory appeal.

¶7 An interlocutory appeal is an appeal to the Board of a ruling made by an administrative judge during a proceeding. An administrative judge may certify an interlocutory appeal if she determines that the issue presented is of such importance to the proceeding that it requires the Board's immediate attention. Either party may make a motion for certification of an interlocutory appeal, or the administrative judge may certify an interlocutory appeal on her own motion. If

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previous orders. If necessary, the administrative judge should address the mootness issue on return of this appeal.

[8] OPM declined the Board's invitation to present oral argument. PFR File, Tab 27; Tr. at 4.

the appeal is certified, the Board will decide the issue and the administrative judge will act in accordance with the Board's decision. *See* 5 C.F.R. § 1201.91.

¶8 An administrative judge will certify a ruling for review if the record shows that the ruling involves an important question of law or policy about which there is substantial ground for difference of opinion; and an immediate ruling will materially advance the completion of the proceeding, or the denial of an immediate ruling will cause undue harm to a party or the public. *See* 5 C.F.R. § 1201.92. An administrative judge has the authority to stay the hearing while an interlocutory appeal is pending with the Board. 5 C.F.R. § 1201.93(c).

¶9 We find that the requirements for certifying a ruling on interlocutory appeal have been satisfied in this appeal. Previously, in *Crumpler v. Department of Defense*, 113 M.S.P.R. 94 (2009),[9] the Board recognized that the legal issue presented here would have potentially far-reaching implications across the federal civil service. *Id.*, ¶ 6. Thus, the administrative judge's ruling involves an important question of law or policy. Moreover, we find that there is substantial ground for difference of opinion concerning the question of whether the limited scope of Board review set forth in *Egan* applies here and that an immediate ruling will materially advance the completion of the proceeding. Therefore, the administrative judge properly certified her ruling for review on interlocutory appeal. *See, e.g., Fitzgerald v. Department of the Air Force*, 108 M.S.P.R. 620, ¶ 6 (2008).

This appeal does not warrant application of the limited Board review prescribed in *Egan*.

¶10 In creating the Merit Systems Protection Board, Congress expressly mandated that the Board adjudicate all matters within its jurisdiction. 5 U.S.C. § 1204. Congress further provided that an employee, as defined in 5 U.S.C.

[9] A settlement agreement was reached in *Crumpler* before the Board had the occasion to address the issue.

§ 7511, against whom certain adverse actions are taken, has the right to invoke the Board's jurisdiction under 5 U.S.C. § 7701. 5 U.S.C. § 7513(d). Such appealable adverse actions include suspensions for more than 14 days. 5 U.S.C. § 7512(2). Congress also clearly delineated the scope of our review in non-performance adverse action appeals by requiring that the Board determine whether the agency's decision is supported by preponderant evidence and promotes the efficiency of the service, and whether the agency-imposed penalty is reasonable. *See* 5 U.S.C. §§ 7513(a); 7701(b)(3) and (c)(1);[10] *Gregory v. Department of Education*, 16 M.S.P.R. 144, 146 (1983). More specifically, in appeals such as this, when the charge involves an agency's withdrawal of its certification or approval of an employee's fitness or other qualification for the position, the Board has consistently recognized that its adjudicatory authority extends to a review of the merits of that withdrawal. *See Adams*, 105 M.S.P.R. 50, ¶ 10.

¶11 The instant appeal falls squarely within our statutory jurisdiction. Specifically, at the time of the action giving rise to this matter, the appellant had been a permanent employee in the competitive service with a service computation date of September 3, 1985. IAF, Tab 5, Subtab 4j. She therefore comes within the definition of "employee" in 5 U.S.C. §§ 7511(a)(1)(A)(ii), which the agency does not dispute. On September 11, 2009, DFAS indefinitely suspended her from her position of GS-525-05 Accounting Technician. *Id.*, Subtabs 4i, 4j. That suspension extended beyond 14 days, and therefore, constitutes an appealable action under 5 U.S.C.§§ 7512(2); 7513(b).

¶12 The agency contends, however, that because this appeal involves the denial of eligibility to occupy an NCS position, it is subject only to the limited review

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[10] The Board's review may also include assessing whether, when taking the adverse action, an agency has engaged in a prohibited personnel practice, such as, e.g., race discrimination, disability discrimination, or reprisal for protected whistleblowing. 5 U.S.C. §§ 7701(c)(2)(B), 2302(b).

prescribed by the Supreme Court in *Egan*. IAF, Tab 5, Subtab 1 at 1-2, 5-6; PFR File, Tab 17, Resp. at 4-12, 14-15. In *Egan*, the Court limited the scope of Board review in an appeal of an adverse action based on the revocation or denial of a "security clearance." There, the Court held that the Board lacks the authority to review the substance of the security clearance determination or to require the agency to support the revocation or denial of the security clearance by preponderant evidence, as it would be required to do in other adverse action appeals. Rather, the Court found that the Board has authority to review only whether the employee's position required a security clearance, whether the clearance was denied or revoked, whether the employee was provided with the procedural protections specified in 5 U.S.C. § 7513, and whether transfer to a nonsensitive position was feasible. 484 U.S. at 530-31; *see also Hesse v. Department of State*, 217 F.3d 1372, 1376 (Fed. Cir. 2000).

¶13 During the course of this interlocutory appeal, the parties stipulated[11] as follows concerning security clearances and access to classified information:

> The parties agree that the positions held by appellants Conyers and Northover did not require the incumbents to have a confidential, secret or top secret clearance. The parties also agree that the positions held by appellants Conyers and Northover did not require the incumbents to have access to classified information.

PFR File, Tab 24. In other words, the appellant is not required to have a security clearance and she is not required to have access to classified information. Therefore, we conclude that *Egan* does not limit the Board's statutory authority to review the appellant's indefinite suspension appeal. We further conclude that *Egan* limits the Board's review of an otherwise appealable adverse action only if that action is based upon a denial, revocation or suspension of a "security

[11] Parties may stipulate to any matter of fact, and the stipulation will satisfy a party's burden of proving the fact alleged. *See* 5 C.F.R. § 1201.63.

clearance," i.e., involves a denial of access to classified information or eligibility for such access, as we more fully explain below.

¶14 We therefore direct the administrative judge, on return of this appeal, to conduct a hearing consistent with the Board's statutory duty to determine whether the appellant's indefinite suspension is supported by a preponderance of the evidence, promotes the efficiency of the service and constitutes a reasonable penalty. *See* 5 U.S.C. §§ 7513(a); 7701(b)(3) and (c)(1). As contemplated by the Board's statutory mandate and our precedent, this adjudicatory authority extends to a review of the merits of the agency's denial of the appellant's eligibility to occupy a NCS position. *See Adams*, 105 M.S.P.R. 50, ¶ 10.

¶15 In *Egan,* the Court characterized its decision as addressing the "*narrow question* presented by this case [namely] whether the [Board] has authority by statute to review the substance of an underlying decision to deny or revoke a security clearance in the course of reviewing an adverse action." 484 U.S. at 520 (emphasis added). In holding that it did not, the Court relied primarily on the premise that the President, as Commander in Chief under the Constitution, had authority to classify and control access to information bearing on national security and that such authority exists apart from any explicit Congressional grant. It concluded therefore that "the grant of security clearance to a particular employee . . . is committed by law to the appropriate agency of the Executive Branch." *Id.* at 527. The Court thus found that "'an agency head who must bear the responsibility for the protection of classified information committed to his custody should have the final say in deciding whether to repose his trust in an employee who has access to such information.'" *Id.* (quoting *Cole v. Young*, 351 U.S. 536, 546 (1956)).

¶16 We believe that the *Egan* Court's limitation of the Board's statutory review authority must be viewed narrowly, most obviously because the Court itself so characterized its holding in that case. Moreover, the Court's rationale rested first and foremost on the President's constitutional authority to "classify and control

access to information bearing on national security" and does not, on its face, support the agency's effort here to expand the restriction on the Board's statutory review to any matter in which the government asserts a national security interest. *Egan*, 484 U.S. at 527-528. In fact, although Mr. Egan held a position that was designated as NCS, *Egan*, 484 U.S. at 521, the Court's limitation of Board review was based on the requirement that he hold a security clearance and on the government's need to protect the classified information to which he had access. *Id.* at 527-30. Nothing in *Egan* indicates that the Court considered the NCS designation alone as sufficient to preclude Board review of the merits of the determination underlying Mr. Egan's removal.[12]

¶17 Nor is there any basis upon which to assume that the Court in *Egan* used the term "security clearance" to mean anything other than eligibility for access to, or access to, classified information. In that regard, we note that the words "security clearance" historically have been used as a term of art referring to access to classified information, and they are not synonymous with eligibility to occupy a sensitive position. *See, e.g., Jones v. Department of the Navy*, 978 F.2d 1223, 1225 (Fed. Cir. 1992) (quoting *Hill v. Department of the Air Force*, 844 F.2d 1407, 1411 (10th Cir. 1988) and describing a "security clearance [as] merely temporary permission by the Executive for access to national secrets"). In addition, the agency in this appeal has conceded that "determinations whether to grant an individual a security clearance and whether an individual is eligible to

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[12] In *Egan*, the Department of the Navy's designation of a position as "noncritical-sensitive" was defined by the applicable Chief of Naval Operations Instruction to include "[a]ccess to Secret or Confidential information." 484 U.S. at 521 n.1. By contrast, here, the agency's designation of the appellant's position as NCS pursuant to OPM regulations includes no such requirement for access to, or eligibility for access to, any classified information. Indeed, the parties stipulated that the appellant is not required to have a security clearance and she has no need for access to any classified information.

occupy a national security sensitive position are separate inquiries." PFR File, Tab 17, Agency Resp. at 5 n.5.

¶18 Executive Order No. 12,968 (Aug. 2, 1995) ("Access to Classified Information"), although failing to provide an explicit definition of "security clearance," pertinently provides that "[n]o employee shall be granted access to classified information unless that employee has been determined to be eligible in accordance with this order and to possess a need-to-know." *Id.*, Section 1.2 (a). Executive Order No. 12,968 further provides that employees shall not be granted access to classified information unless they have: (1) Been determined "eligible" for access by "agency heads or designated officials" under Section 3.1 "based on a favorable adjudication of an appropriate investigation of the employee's background;" (2) a demonstrated need-to-know; and (3) signed a nondisclosure agreement. *Id.*, Section 1.2(c)(1)-(3). The Department of Defense Personnel Security Program Regulation, consistent with the above, defines "security clearance" as "[a] determination that a person is eligible under the standards of [32 C.F.R. Part 154] for access to classified information." 32 C.F.R. § 154.3(t). We thus conclude that *Egan* limits the Board's statutory review of an appealable adverse action only when such review would require the Board to review the substance of the "sensitive and inherently discretionary judgment call . . . committed by law to the . . . Executive Branch" when an agency has made a determination regarding an employee's access to classified information, i.e., a decision to deny, revoke or suspend access, or eligibility for access to classified information. *Egan*, 484 U.S. at 527. Our use of the term "security clearance" in this Opinion and Order includes this specific understanding.[13]

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[13] Member Rose suggests in dissent that when the *Egan* Court used the term "security clearance," it did not use it as a term of art limited to the grant of access to, or eligibility for access to, classified information. Rather, she suggests that *Egan*, "when read as a whole," shows that the Court was more generally concerned with any "discretionary national security judgments committed to agency heads, regardless of whether the employee ... needed access to classified information as part of his job." As

¶19 Furthermore, prior to the Board's now vacated decision in *Crumpler v. Department of Defense*, 112 M.S.P.R. 636 (2009), *vacated*, 113 M.S.P.R. 94 (2009), the Board had long considered *Egan*'s restriction on its statutory review as confined to adverse actions based on security clearance revocation and refused to extend the restriction to non-security clearance appeals where the actions arguably implicated national security. *See, e.g., Jacobs v. Department of the Army*, 62 M.S.P.R. 688 (1994); *Adams*, 105 M.S.P.R. 50. In *Jacobs*, the Board held that it had the authority to review a security guard's disqualification from the Chemical Personnel Reliability Program based on his alleged verbal assault of a security officer. 62 M.S.P.R. at 689-90, 694. The Board stated:

> The role of protecting that national chemical weapons program is, without doubt, a very important role. The importance of that role, however, should not divest civilian employees who work in that program of the basic employment protections guaranteed them under law. Neither should the 'military' nature of such employment, nor should the program's requirements for the ability to react to changing situations with dependability, emotional stability, proper social adjustment, sound judgment, and a positive attitude toward program objectives and duly constituted authority.

Id. at 694. The Board explicitly found as follows:

> The Supreme Court's decision in *Egan* was narrow in scope and specifically applied only to security clearance revocations. As the protector of the government's merit systems, the Board is not eager to expand the scope of the rationale in *Egan* to divest federal employees whose positions do not require a security clearance of basic protections against non-meritorious agency actions.

Id. at 695.

¶20 In *Jacobs*, the Board further addressed the agency's concern, expressed also in this appeal, PFR File, Tab 17, Resp. at 6-7, that as an outside non-expert

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we thoroughly explain in our opinion today, such an expansive reading of *Egan* ignores the facts and much of the analysis in *Egan*, numerous decisions of the Federal Circuit and Board interpreting *Egan* over the last 20 years, as well as the definition of security clearance found in the Department of Defense's own regulation.

body, the Board should not second-guess its attempts to predict the appellant's future behavior. The Board found that most of the removal actions taken by agencies are based at least in part on an attempt to predict an employee's future behavior. It noted that, in *Douglas v. Veterans Administration*, 5 M.S.P.R. 280, 305-06 (1981), the Board set forth a range of factors that an agency should consider in making a penalty determination, which included an estimate of the employee's rehabilitation potential. The Board found that the basis of progressive discipline is that an employee who has engaged in repeated misconduct will be likely to do so again in the future. *Jacobs*, 62 M.S.P.R. at 695. Thus, when an agency acts based on such predictive judgments in imposing a penalty, the Board is required by its statutory mandate to evaluate the propriety of those agency judgments.[14] *Douglas* and *Jacobs* are not isolated cases, as the Board's case law is replete with decisions in which the Board has reviewed an agency's predictions regarding an employee's future conduct and potential for rehabilitation. *See Jacobs*, 62 M.S.P.R. at 695.

¶21 Similarly, in *Adams*, the Board found that *Egan* did not preclude its review of the propriety of the agency's denial of access to sensitive personnel information in an appeal of a human resources assistant's removal for "failure to maintain access to the Command computer system." 105 M.S.P.R. 50, ¶¶ 6, 9-12. The Board acknowledged the agency's argument, similar to that made in this appeal, PFR File, Tab 17, Resp. at 7, that the suspension of computer access was not an appealable adverse action, that the federal government had not waived its sovereign immunity from challenges to such actions, and that the Board's authority to review those actions was barred under *Egan*. *See Adams*, 105 M.S.P.R. 50, ¶ 9. But the Board found no merit to those arguments. It noted that the agency did not deny that, in 5 U.S.C. § 7513, Congress has authorized the

[14] The record before us lacks evidence of any "delicate national security judgments that are beyond [the Board's] expertise" as suggested by the dissent.

Board to adjudicate removals. As previously noted, the Board found that adjudication of such an appeal requires the Board to determine whether the agency has proven the charge or charges on which the removal is based; and, when the charge consists of the employing agency's withdrawal or revocation of its certification or other approval of the employee's fitness or other qualifications to hold his position, the Board's authority generally extends to a review of the merits of that withdrawal or revocation. *Id.*, ¶ 10.

¶22 In *Adams*, the Board acknowledged "narrow exceptions" to the Board's authority to review the merits of agency determinations underlying adverse actions, and found that one such exception was addressed in *Egan*. It distinguished *Egan*, however, as follows:

> The present appeal does not involve the national security considerations presented in *Egan*. While the agency's computer system provides employees with access to sensitive information, the agency has acknowledged that the information is not classified and has indicated that it does not consider access to that information to be equivalent to possession of a security clearance. . . . The decision to suspend the appellant's computer access is similar instead to determinations the Board has found it has the authority to review.

Adams, 105 M.S.P.R.50, ¶ 12.[15]

¶23 In addition to our longstanding precedent, however, we are guided by the Supreme Court's opinion in *Cole v. Young*, 351 U.S. 536 (1956),[16] cited with

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[15] In addition to *Jacobs* and *Adams*, the Board has held that, despite *Egan*, it has the authority to review the decision of an agency credentials committee to revoke an employee's clinical privileges, when that revocation was the basis for the employee's removal, *Siegert v. Department of the Army*, 38 M.S.P.R. 684, 687-91 (1988); and to review the validity of a medical determination underlying the removal of an air traffic control specialist, *Cosby v. Federal Aviation Administration*, 30 M.S.P.R. 16, 18-19 (1986).

[16] Member Rose sees little value in the Supreme Court's *Cole* decision, in part because it was decided in 1956, "22 years before the Civil Service Reform Act." As we note in our decision, though, *Cole* specifically addressed the "Act of August 26, 1950," the predecessor to 5 U.S.C. § 7532. Further, Executive Order No. 10,450, significantly relied on by the dissent, was promulgated in 1953 to implement the 1950 Act. In

approval in *Egan,* 484 U.S. at 529, which provides persuasive and considerable support for viewing *Egan* as narrowly limited to appeals involving security clearances. There, the Court addressed whether the removal of a preference-eligible veteran employee of the Department of Health, Education, and Welfare was authorized under the Act of August 26, 1950 (the Act).[17] In ruling that

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addition, the relevant regulations issued by OPM, and relied on by Member Rose to find that the Board lacks authority to review the adverse action at issue, are based on Executive Order No. 10,450, and OPM has advised the Board that the regulations do not create or diminish any employee appeal rights.

[17] The Act was the precursor to 5 U.S.C. § 7532 and gave to the heads of certain government departments and agencies summary suspension and unreviewable dismissal powers over civilian employees when deemed necessary "in the interest of the national security of the United States." This express provision within the Civil Service Reform Act (CSRA) for accommodating national security concerns further undermines the agency's claim that the President's constitutional authority as Commander in Chief preempts our statutory review. The argument is tenuous, at best, insofar as it rests upon the misguided premise that the President alone possesses power in the area of national security. Instead, the Constitution gives Congress the power "to declare war" (Art. 1, sec. 8, cl. 11), "to raise and support Armies" (Art. 1, sec. 8, cl. 12), "to provide and maintain a Navy" (Art. 1, sec. 8, cl. 13) and "to make Rules for the Government and Regulation of the land and naval Forces" (Art. 1, sec. 8, cl. 14), and, thus, plainly establishes that Congress also has authority with regard to ensuring national security. *Cf. U.S. v. North*, 708 F. Supp. 380, 382 (D.D.C. 1988) (rejecting plaintiff's constitutional argument that "the asserted primacy of the White House in foreign affairs" precludes prosecution for false Congressional testimony, the court looked to various constitutional provisions in recognizing that "Congress surely has a role to play in aspects of foreign affairs....")

The CSRA is the comprehensive scheme created by Congress governing federal employment. *See U.S. v. Fausto*, 484 U.S. 439, 443 (1988). In 5 U.S.C. § 7532, Congress expressly delineated those areas where Board review is circumscribed due to national security concerns. There is no evidence that Congress intended that the President could unilaterally and broadly expand these exceptions so as to effectively eliminate Board and judicial review of the reasons underlying adverse actions taken against federal employees, such as the appellant, whose positions do not require access, or eligibility for access, to classified information. Absent any indication that Congress contemplated and ordained such a result, we believe that *Egan's* exception to the Board's statutory jurisdiction must be read narrowly.

Executive Order No. 10,450[18] did not trump the employee's statutory veterans' preference rights, the *Cole* Court interpreted "national security" as used in the Act.[19] *Cole*, 351 U.S. at 538. Significantly, in so doing, the *Cole* Court did not avoid review of the removal or identify any rule of limited review merely because the Executive Branch of the government alleged that matters of "national security" were at issue.[20] Moreover, although the Court determined that an employee may be dismissed using the summary procedures and unreviewable dismissal power authorized by the 1950 statute only if he occupied a "sensitive" position, the Court plainly equated having a "sensitive" position with having access to classified information. *Id.* at 551, 557 n.19. The *Cole* decision thus clearly supports the Board's determination that its statutory jurisdiction over an otherwise appealable action cannot be preempted by an agency's generalized claim of "national security."[21]

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[18] Executive Order No. 10,450 was promulgated in April 1953 to provide uniform standards and procedures for agency heads in exercising the suspension and dismissal powers under the 1950 Act. *Cole*, 351 U.S. at 551. It also extended the Act to other agencies. *See id.* at 542.

[19] The Supreme Court's *Cole* decision and its decision in *National Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989), plainly contradict the dissent's bold claim that an agency's decision "that retaining an employee would be inconsistent with the interests of national security has never been subject to third-party review before today." In both cases, the Court subjected agency claims regarding national security to judicial scrutiny. *See also* note 21 *supra*.

[20] The *Cole* Court notably stated that it would not lightly assume that Congress intended to take away the normal dismissal procedures of employees "in the absence of some overriding necessity, such as exists in the case of employees handling defense secrets." 351 U.S. at 546-47.

[21] Even in cases where the Executive Branch has sought to defend its action on the grounds of protecting classified information, the Court has not abstained from subjecting such assertions to searching judicial scrutiny. *See Von Raab*, 489 U.S. 656. There, employees challenged the Customs Service decision to subject whole categories of employees to random drug-testing on the basis of their presumed access to classified information. Deeming the record insufficient to determine whether the agency overreached, the Court remanded to the Fifth Circuit with instructions to "examine the

¶24 In this regard, we agree with the appellant that the potential impact of the agency's argument that *Egan* precludes the Board from reviewing the merits of an agency's adverse action, even when security clearances are not involved, is far-reaching. Accepting the agency's view could, without any Congressional mandate or imprimatur, preclude Board and judicial review of alleged unlawful discrimination, whistleblower retaliation, and a whole host of other constitutional and statutory violations for multitudes of federal employees subjected to otherwise appealable removals and other adverse actions. *See El-Ganayni v. Department of Energy*, 591 F.3d 176, 184-186 (3d Cir. 2010) (First Amendment claim and Fifth Amendment Equal Protection claim must be dismissed because legal framework would require consideration of the reasons a security clearance was revoked); *Bennett v. Chertoff*, 425 F.3d 999, 1003-04 (D.C. Cir. 2005) (adverse action based on denial or revocation of a security clearance not actionable under Title VII of the Civil Rights Act of 1964); *Hesse*, 217 F.3d at 1377 (*Egan* precludes Board review of Whistleblower Protection Act whistleblower claims in indefinite suspension appeal); *Ryan v. Reno*, 168 F.3d 520, 524 (D.C. Cir. 1999) (adverse action based on denial of a security clearance not actionable under Title VII of the Civil Rights Act of 1964); *Jones*, 978 F.2d at 1225-26 (no employee has a "property" or "liberty" interest in a security clearance or access to classified information and thus no basis for a constitutional right); *Pangarova v. Department of the Army*, 42 M.S.P.R. 319, 322-24 (1989) (*Egan* precludes the Board from reviewing discrimination or reprisal allegations intertwined with the agency's denial of a security clearance).

¶25 Therefore, we find that the Supreme Court's decision in *Egan* does not support the conclusion that the Board lacks the authority to review the

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criteria used by the [Customs] Service in determining what materials are classified and in deciding whom to test under this rubric." *Id.* at 678.

determination underlying the agency's indefinite suspension here.[22] The Board may exercise its full statutory review authority and review the agency's determination that the appellant is no longer eligible to hold a "sensitive" position, because this appeal does not involve a discretionary agency decision regarding a security clearance.[23]

The agency's decision to characterize the appellant's position as a national security position and to designate it NCS is insufficient to limit the Board's scope of review to that set forth in *Egan*.

¶26 In 5 C.F.R. Part 732, OPM set forth "certain requirements and procedures which each agency shall observe for determining national security positions pursuant to Executive Order No. 10450 – Security Requirements for Government Employment (April 27, 1953), 18 FR 2489, 3 CFR 1949-1953 Comp., p. 936, as amended." 5 C.F.R. § 732.101. OPM's regulations state that the term "national security position" includes:

> (1) Those positions that involve activities of the Government that are concerned with the protection of the nation from foreign aggression or espionage, including development of defense plans or policies, intelligence or counterintelligence activities, and related activities

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[22] We are not finding that the Board has the authority to determine whether the agency has properly designated the appellant's position as NCS. *See Skees v. Department of the Navy*, 864 F.2d 1576, 1578 (Fed. Cir. 1989) (Board lacks the authority to review an agency's determination that a position requires a security clearance); *Brady v. Department of the Navy*, 50 M.S.P.R. 133, 138 (1991) (Board lacks the authority to review an agency's determination to designate a position as NCS). We are simply finding that the agency's decision to designate a position as a "national security" position or as a "sensitive" one, standing alone, does not limit the Board's statutory review authority over an appealable adverse action. We note that the agency has not contested the appellant's assertion that DFAS has designated 100% of its positions as sensitive.

[23] We recognize that Congress has specifically excluded groups of employees from having Board appeal rights or from having protection against prohibited personnel practices, such as employees of the Central Intelligence Agency, the Federal Bureau of Investigation, and intelligence components of the Department of Defense. *See* 5 U.S.C. §§ 2303(a)(2)(C), 7511(b)(7), (8). Congress has not similarly excluded the agency in the current appeal.

> concerned with the preservation of the military strength of the United States; and
>
> (2) Positions that require regular use of, or access to, classified information.

5 C.F.R. § 732.102(a). The regulations further provide:

> For purposes of this part, the head of each agency shall designate, or cause to be designated, any position within the department or agency the occupant of which could bring about, by virtue of the nature of the position, a material adverse effect on the national security as a sensitive position at one of three sensitivity levels: Special-Sensitive, Critical-Sensitive, or Noncritical-Sensitive.

5 C.F.R. § 732.201(a). The agency argues that, although the appellant's position did not require a security clearance, the Board is nevertheless precluded under *Egan* from reviewing whether she was improperly suspended based upon the agency's determination that she was ineligible to occupy a national security position. PFR File, Tab 43, Br. at 7. We disagree.

¶27 OPM's interpretation of its own regulations at 5 C.F.R. Part 732 supports the conclusion that our review of an adverse action is not limited by *Egan* solely based on the agency's designation of the position as a national security position or as "sensitive." In that regard, OPM has not interpreted its regulations to preclude the usual scope of Board review for adverse actions taken against employees based on ineligibility to occupy NCS positions. Rather, OPM concluded that the Board cannot determine the scope of its review by referring to 5 C.F.R. Part 732. PFR File, Tab 10, Advisory Op. at 3. OPM stated:

> OPM's regulations in 5 C.F.R. Part 732 are silent on the scope of an employee's rights to Board review when an agency deems the employee ineligible to occupy a sensitive position. The regulations do not independently confer any appeal right or affect any appeal right under law.

Id. at 2. It similarly stated concerning its regulations:

> [T]hey do not address the scope of the Board's review when an agency takes an adverse action against an employee under 5 U.S.C. § 7513(a) following an unfavorable security determination. Likewise, OPM's adverse action regulations in 5 C.F.R. Part 752 do

> not address any specific appellate procedure to be followed when an adverse action follows an agency's determination that an employee is ineligible to occupy a sensitive position.

Id. at 3. Thus, OPM has not interpreted its own regulations as precluding the Board's usual scope of review in these appeals.

¶28 In its October 18, 2010 statement, ODNI refers to Executive Order No. 13,467 (June 30, 2008), in arguing that the limited scope of Board review set forth in *Egan* should apply in this appeal. PFR File, Tab 48, Statement at 1. ODNI notes that Executive Order No. 13,467, which is entitled "Reforming Processes Related to Suitability for Government Employment, Fitness for Contractor Employees, and Eligibility for Access to Classified National Security Information," designated the Director of National Intelligence (DNI) as the Security Executive Agent (SEA) for the federal government. *Id.* at 1. It further notes that, in setting forth the SEA's responsibilities relating to overseeing investigations, developing policies and procedures, issuing guidelines and instructions, serving as a final authority, and ensuring reciprocal recognition among agencies, the Executive Order consistently referred to that authority as relating to both determinations of eligibility for access to classified information or eligibility to hold a sensitive position. *Id.* at 1-2. It thus argues that the President has given the DNI "oversight authority over eligibility determinations, whether they entail access to classified information or eligibility to occupy a sensitive position, regardless of sensitivity level." *Id.* at 2.

¶29 ODNI appears to be arguing, as does the agency, that because executive orders refer to both eligibility for access to classified information and eligibility to occupy a sensitive position -- or because the agency decided to adjudicate determinations involving access to classified information and eligibility to occupy a sensitive position through the same WHS/CAF process -- the same Board review authority must necessarily apply. Neither ODNI nor the agency has

shown that such a circular argument provides a basis for limiting the statutory scope of our review in adverse action appeals.

¶30 For the first time at oral argument and in its closing brief, the agency apparently argues that, following *Egan*, Congress has imposed another limitation on the Board's review authority by enacting 10 U.S.C. § 1564(e). Tr. at 31-32; PFR File, Tab 43, Br. at 5. Section (e) provides as follows:

> Sensitive Duties. - For the purpose of this section, it is not necessary for the performance of duties to involve classified activities or classified matters in order for the duties to be considered sensitive and critical to national security.

¶31 We find that the agency has failed to show that 10 U.S.C. § 1564 imposes an additional Congressional limitation on the Board's review authority. Section 1564 is entitled "Security clearance investigations." Subsection (a) sets outs the reason for the section as follows:

> Expedited Process. - The Secretary of Defense shall prescribe a process for expediting the completion of the background investigations necessary for granting security clearances for Department of Defense personnel and Department of Defense contractor personnel who are engaged in sensitive duties that are critical to the national security.

Thus, the statutory section as a whole reveals that it is concerned with the process for granting security clearances, which are not at issue in this appeal.[24] In any event, the statute does not limit the Board's authority to adjudicate adverse action appeals.

¶32 We therefore find that the Board has the authority to review the merits of the agency's decision to find the appellant ineligible to occupy an NCS position,

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[24] In that regard, we note that the statute does not explicitly define "security clearances" as anything other than eligibility for access to, or access to, classified information. We reject the agency's attempt to equate "security clearances" with its decisions to designate positions as "sensitive" or to find that employees are no longer eligible for such sensitive positions. Absent a requirement that an employee have access to classified information, or be eligible for such access, *Egan* does not limit the Board's review of an appealable adverse action taken against a covered employee.

and that the Board's authority to exercise its statutory review of the appellant's indefinite suspension is not limited by *Egan*. Applying the full scope of Board review in appeals such as this will not prevent agencies from taking conduct-based adverse actions or suitability actions in appropriate cases. Likewise, agencies may respond to urgent national security issues, even for employees who do not have eligibility for access to, or access to, classified information, by exercising their statutory authority to impose indefinite suspensions and removals through the national security provisions in 5 U.S.C. § 7532. *See, e.g., King v. Alston*, 75 F.3d 657, 659 n.2 (Fed. Cir. 1996). Here, however, the agency did not choose to act under 5 U.S.C. § 7532, an option the dissent fails to mention. If the agency believed that a Board appeal would involve delicate national security matters beyond the Board's expertise, or that a Board order might create a conflict with its national security obligations pursuant to Executive Order No. 10,450, it could have exercised its authority pursuant to 5 U.S.C. § 7532. *See id.*

¶33 The agency argues that a Board decision to reverse its action would place it in an impossible position because it must either violate an agency head's decision and allow an employee "who presents a national security risk" to occupy a sensitive position or violate the Board's order. PFR File, Tab 17, Resp. at 8-9. We note, however, that the agency's own actions belie its concern. Although on June 27, 2007, the WHS/CAF issued the appellant its tentative decision to deny her eligibility to occupy her NCS position, the agency did not issue its decision to actually suspend her from the position until September 3, 2009. IAF, Tab 5, Subtabs 4b, 4i. Thus, the agency kept the appellant in her NCS position for over two years after making a tentative determination to deny her eligibility. Although the appellant was admittedly proceeding through the agency's internal review process during part of this time, the record does not indicate that the agency took any action between the appellant's September 22, 2007 response to its tentative determination to deny her eligibility and its February 18, 2009 decision to deny her eligibility, i.e., for over one year. *Id.*, Subtabs 4d, 4e. Therefore, the

agency's own actions do not support its fear of being put in an impossible position by the possibility that the Board might disagree with its decision and order reinstatement.

The interlocutory appeal must be returned for further proceedings.

¶34 Because *Egan*'s limited scope of Board review does not apply in this appeal, Board review of the challenged indefinite suspension includes consideration of the underlying merits of the agency's reasons to deny the appellant eligibility to occupy an NCS position. The administrative judge should thus adjudicate this appeal under the generally applicable standards the Board applies in adverse action appeals, including the legal principles governing off-duty or on-duty conduct as applicable.

ORDER

¶35 Accordingly, we vacate the stay order issued in this proceeding and return the appeal to the administrative judge for further processing and adjudication consistent with this Opinion and Order.

FOR THE BOARD:

_____

William D. Spencer
Clerk of the Board
Washington, D.C.

DISSENTING OPINION OF MARY M. ROSE

in

Rhonda K. Conyers v. Department of Defense

MSPB Docket Nos. CH-0752-09-0925-I-1 & CH-0752-09-0925-I-2

¶1 As explained below, I would hold that the Board cannot review the reasons underlying the agency's determination that the appellant is no longer eligible to occupy a sensitive position. When Congress created the Merit Systems Protection Board, it did not mean to limit (assuming it could have) the longstanding discretion vested in the President and agency heads over national security matters. The substance of an agency's decision that retaining an employee would be inconsistent with the interests of national security has never been subject to third-party review before today, and I would hold that it is not subject to such review.

BACKGROUND

¶2 The appellant was a GS-525-05 Accounting Technician with the Defense Finance & Accounting Service. By authority of Executive Order No. 10,450 and 5 C.F.R. Part 732, the agency designated the appellant's position as "non-critical sensitive," based on its judgment that the incumbent "could bring about, by virtue of the nature of the position, a material adverse effect on the national security." Initial Appeal File (IAF), Tab 5, Subtab 4A; *see* 5 C.F.R. § 732.201(a). Effective September 11, 2009, the agency suspended the appellant indefinitely because the agency's Washington Headquarters Services (WHS) Consolidated Adjudications Facility (CAF) had denied her continued "eligibility to occupy a sensitive position." Specifically, the agency stated that the appellant's position required her to have access to sensitive information, that the WHS/CAF had denied her such access, and that as a result she did not meet a qualification requirement of

her position. The suspension was imposed pending her appeal to the Defense Office of Hearings and Appeals. IAF, Tab 5, Subtabs 4G, 4I.

¶3 The appellant filed this appeal. IAF, Tab 1. In response, the agency argued that the Board lacks authority to review the reasons underlying its determination that the appellant is no longer eligible to occupy a sensitive position or have access to sensitive information. IAF, Tab 5, Subtab 1 at 1-2, 5-6. The administrative judge dismissed the appeal without prejudice pending the outcome of related litigation at Board headquarters, IAF, Tab 13, and the appeal was later refiled, IAF (I-2), Tab 1. Subsequently, the administrative judge ruled that the Board is not restricted in its authority to review the reasons underlying the agency's determination to disqualify the appellant from a sensitive position. The administrative judge certified her ruling for interlocutory review by the full Board. IAF (I-2), Tab 4. In the ensuing proceeding at headquarters, the parties and amici filed numerous briefs, and the Board held oral argument on the legal issues presented.

DISCUSSION

¶4 Executive Order No. 10,450, 18 Fed. Reg. 2489 (1953), provides in relevant part as follows:

> NOW, THEREFORE, by virtue of the authority vested in me by the Constitution and statutes of the United States . . ., and as President of the United States, and deeming such action necessary in the best interests of the national security, it is hereby ordered as follows:
>
> * * *
>
> Sec. 2. The head of each department and agency of the Government shall be responsible for establishing and maintaining within his department or agency an effective program to insure that the employment and retention in employment of any civilian officer or employee within the department or agency is clearly consistent with the interests of the national security.
>
> Sec. 3. (a) The appointment of each civilian officer or employee in any department or agency of the Government shall be made subject to investigation. The scope of the investigation shall be determined

> in the first instance according to the degree of adverse effect the occupant of the position sought to be filled could bring about, by virtue of the nature of the position, on the national security . . . .
>
> (b) The head of any department or agency shall designate, or cause to be designated, any position within his department or agency the occupant of which could bring about, by virtue of the nature of the position, a material adverse effect on the national security as a sensitive position. Any position so designated shall be filled or occupied only by a person with respect to whom a full field investigation has been conducted.

¶5 Based on Executive Order No. 10,450, 5 U.S.C. § 3301, and other authorities, the Office of Personnel Management (OPM) has issued regulations at 5 C.F.R. Part 732 governing "National Security Positions." The regulations provide, at 5 C.F.R. § 732.101, as follows:

> This part sets forth certain requirements and procedures which each agency shall observe for determining national security positions pursuant to Executive Order 10450 . . . .

The regulations further provide, at 5 C.F.R. § 732.102:

> (a) For purposes of this part, the term "national security position" includes:
>
> (1) Those positions that involve activities of the Government that are concerned with the protection of the nation from foreign aggression or espionage, including development of defense plans or policies, intelligence or counterintelligence activities, and related activities concerned with the preservation of the military strength of the United States; and
>
> (2) Positions that require regular use of, or access to, classified information. Procedures and guidance provided in OPM issuances apply.

Additionally, the regulations provide at 5 C.F.R. § 732.201:

> (a) For purposes of this part, the head of each agency shall designate, or cause to be designated, any position within the department or agency the occupant of which could bring about, by virtue of the nature of the position, a material adverse effect on the national security as a sensitive position at one of three sensitivity levels: Special-Sensitive, Critical-Sensitive, or Noncritical-Sensitive.

¶6 The majority holds that although the Board lacks authority to review the reasons underlying an agency's decision to deny an employee access to classified information, the Board is authorized to review the reasons underlying an agency's determination that an employee is no longer eligible to occupy a sensitive position where classified information is not involved. I disagree.

I. Supreme Court precedent precludes the Board from reviewing the reasons underlying an agency's determination that an employee is no longer eligible to occupy a sensitive position.

¶7 In *Department of the Navy v. Egan*, 484 U.S. 518, 520-21 (1988), the Supreme Court considered the appeal of an individual appointed to a non-critical sensitive position on a military base, with his duties limited pending "satisfactory completion of security and medical reports." The agency discovered unfavorable information about Mr. Egan during its background investigation that it believed made him a security risk, and notified him of his right to respond. In the meantime, however, Mr. Egan completed his probationary period, thereby gaining appeal rights under 5 U.S.C. §§ 7511-7513. *Id.* at 521-22. Ultimately the agency found Mr. Egan ineligible for his position and removed him. *Id.* at 522. On appeal, the Board held that it lacks authority to review the reasons underlying an agency's determination that an individual poses an unacceptable threat to national security if allowed to remain in his position. *Id.* at 524; *see Egan v. Department of the Navy*, 28 M.S.P.R. 509 (1985).

¶8 In a later phase of the appeal, the Supreme Court agreed with the Board. The Court framed the issue before it to be whether the Board "has authority by statute to review the substance of an underlying decision to deny or revoke a security clearance in the course of reviewing an adverse action." 484 U.S. at 520. I do not agree with the majority that the Court was using the term "security clearance" as a term of art to mean a grant of access to classified information or eligibility for such access. The *Egan* decision, when read as a whole, makes clear that the Court was concerned with the Board intruding on discretionary national

security judgments committed to agency heads, regardless of whether the employee affected needed access to classified information as part of his job. One clear indication of the meaning of *Egan* is the Court's statement that once Mr. Egan was denied a "security clearance," his only possibility for continued employment was in a "nonsensitive position." *Id.* at 522. In other words, the Court considered a "security clearance" to be a requirement for any sensitive position.

¶9 In fact, the centerpiece of *Egan*'s discussion of the limits on Board review, Executive Order No. 10,450, makes no mention of classified information whatsoever. The Court discussed the requirements of Executive Order No. 10,450 in depth while using the terms "security clearance" and "clearance" in reference to "national security" positions generally, and did not confine its discussion to positions involving access to classified information. *Id.* at 528-29, 531. "National security position" refers not just to positions that require access to classified information, 5 C.F.R. § 732.102(a)(2), but also to positions not requiring such access but that "involve activities of the Government that are concerned with the protection of the nation from foreign aggression or espionage, including development of defense plans or policies, intelligence or counterintelligence activities, and related activities concerned with the preservation of the military strength of the United States," 5 C.F.R. § 732.102(a)(1). Accordingly, I interpret *Egan* as holding that the Board lacks authority to review the reasons underlying an agency's determination that an employee is not eligible for a sensitive position, *i.e.*, a "national security position" within the meaning of Executive Order No. 10,450 and 5 C.F.R. Part 732, regardless of whether the employee worked with classified information. 484 U.S. at 529-30. As the Court explained, national security matters are traditionally the province of the President and, by delegation, the heads of the relevant agencies. *Id.* at 530. A non-expert outside body such as the Board is poorly-suited to making the necessary "predictive judgments" about the risk that

an individual poses to national security. *Id.* at 529. Congress simply did not intend to "involve the Board in second-guessing [an] agency's national security determinations." *Id.* at 531-32.[1]

¶10 The case of *Cole v. Young*, 351 U.S. 536 (1956), discussed by the majority, does not alter my conclusion. *Cole* was decided 22 years before the passage of the Civil Service Reform Act, which created the Board and contained the version of 5 U.S.C. § 7513 addressed in *Egan*. As a consequence, *Cole* does not provide guidance on the scope of the Board's review authority under section 7513. Moreover, *Cole* is distinguishable. In *Cole*, the Court held that an agency could not invoke a 1950 law authorizing summary removal of an employee who posed a threat to "national security" unless it had first made the "subsidiary determination" that the employee's position actually implicated "national security." 351 U.S. at 556. The Court found that Mr. Cole's termination was not authorized by the 1950 law because his employing agency had never made the requisite "subsidiary determination." *Id.* at 557. By contrast, in the present appeal, it is undisputed that the agency has formally determined, in accordance with Executive Order No. 10,450 and 5 C.F.R. Part 732, that the appellant's Accounting Technician position is a "national security" position. IAF, Tab 5, Subtab 4A.

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[1] Title 10 U.S.C. § 1564, "Security Clearance Investigations," provides further support for my view that the term "security clearance" does not have the fixed, limited meaning ascribed to it by the majority. Subsection (a), "Expedited Process," charges the Secretary of Defense with improving the timeliness of completion of "background investigations necessary for granting security clearances." Subsection (e), "Sensitive Duties," provides that "[f]or the purpose of this section, it is not necessary for the performance of duties to involve classified activities or classified matters in order for the duties to be considered sensitive and critical to the national security." I therefore disagree with footnote 20 of the majority opinion, which states that under section 1564 the term "security clearance" relates only to employees who need access to classified information as part of their jobs.

¶11 Additional cases cited by the majority also do not provide guidance on the issue at hand. In *Adams v. Department of the Army*, 105 M.S.P.R. 50 (2007), *aff'd*, 273 F. App'x 947 (Fed. Cir. 2008), the Board held that it had authority to review the reasons underlying the agency's decision to suspend the appellant's access to certain computer systems that he needed to use as part of his job. In *Jacobs v. Department of the Army*, 62 M.S.P.R. 688 (1994), the Board held that it had authority to review a security guard's disqualification from the Army's Chemical Personnel Reliability Program based on his alleged misconduct. In *Siegert v. Department of the Army*, 38 M.S.P.R. 684, 687-91 (1988), the Board held that it had authority to review the agency's reasons for revoking a Clinical Psychologist's privileges, and in *Cosby v. Federal Aviation Administration*, 30 M.S.P.R. 16, 18-19 (1986), the Board held that it had authority to review the agency's determination that an Air Traffic Controller was medically disqualified from his position. *Adams*, *Jacobs, Siegert*, and *Cosby* stand for the proposition that agencies cannot evade Board review of the reasons for an adverse action merely by creating their own credentialing or fitness standards and then finding those standards unmet. *Adams*, *Jacobs, Siegert*, and *Cosby* do not discuss or even cite Executive Order No. 10,450 or 5 C.F.R. Part 732; as a result, they do not support a finding that the Board has authority to review an agency's national security judgments made under delegation from the President.

¶12 Finally, in *National Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989), the Court ruled that the Customs Service could institute a drug testing program for employees involved in drug interdiction and who carried firearms, notwithstanding the employees' objection that such testing violated their constitutional right to be free from unreasonable searches; the Court remanded the cases for findings on the validity of the drug testing program as it related to employees who handled classified material. *Van Raab* said nothing about Executive Order No. 10,450 or Board review of adverse actions.

II. Alternatively, even if Supreme Court precedent does not directly address the issue, the Board cannot review an agency's determination that an employee is no longer eligible to occupy a sensitive position because doing so would involve the Board in sensitive national security judgments that are beyond its expertise and that it is not authorized to make.

¶13 The majority reads *Egan* as leaving open the question of the scope of Board review in adverse action appeals involving employees who occupied sensitive positions but did not need access to classified information as part of their jobs. I do not read *Egan* this narrowly. If I did, however, I nevertheless would hold that the Board cannot review the reasons underlying an agency's decision that an employee is no longer eligible for a sensitive position, even when the employee did not work with classified information, because doing so would involve the Board in delicate national security judgments that are beyond its expertise and that it is not authorized to make.

¶14 Regardless of whether an employee in a sensitive position handles classified information, for the Board to review the reasons underlying the agency's decision that an individual's continued employment poses a threat to national security requires the Board to make the "predictive judgments" that the Court said in *Egan* the Board is ill-equipped to make. 484 U.S. at 529. The majority likens these "predictive judgments" to matters that the Board routinely considers under *Douglas v. Veterans Administration*, 5 M.S.P.R. 280 (1981). It is true that when reviewing an agency-imposed penalty for misconduct the Board may consider an employee's rehabilitation potential, *id.* at 305, which is akin to predicting future behavior. Nevertheless, any such prediction within the *Douglas* framework is fundamentally different from determining "what constitutes an acceptable margin of error in assessing the potential risk" that an employee poses to national security. *Egan*, 484 U.S. at 529. The latter judgment is an inherently military one where, as in this appeal, the employee worked for a component of the Department of Defense. In *Egan*, the Court explicitly found that the Board is not an expert in the methods for protecting classified information in the military's

custody, 484 U.S. at 529, and nothing in the structure or staffing of the Board makes it sufficiently expert in military affairs to review other military judgments not involving classified information. As agency counsel observed at oral argument, although an employee with access to classified information might pose a more obvious threat to national security than an employee in a sensitive position who does not work with classified information, the difference between the two employees is one of degree, not kind.

¶15 Apart from the Board's lack of expertise in national security matters, the Board is not authorized to decide whether an employee is eligible for retention in a sensitive position. When the Board reviews an adverse action, the standard the Board applies is whether the action "promote[s] the efficiency of the service." 5 U.S.C. § 7513(a). When an agency determines whether an individual may continue to occupy a sensitive position, the standard the agency applies is whether "retention in employment" is "clearly consistent with the interests of national security." Executive Order No. 10,450, § 2. The Board does not apply the latter standard in adverse action appeals, nor is it permitted to do so under statute, Executive Order No. 10,450, or any other authority. Therefore, the distinction between an agency's determination to deny an employee access to classified information, which the majority says the Board cannot review, and an agency's determination to deny continued employment in a sensitive position where classified information is not involved, which the majority says the Board may review, is an artificial one.

¶16 It bears emphasizing that Executive Order No. 10,450 was issued 25 years before Congress created the Board in the Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1111. As stated in the Preamble to Executive Order No. 10,450, the position sensitivity system is based on the President's authority under the Constitution and related statutes which, as *Egan* explains, make the President the head of the Executive branch and the steward of national security. The President has delegated certain national security and management functions

to agency heads in Executive Order No. 10,450. Assuming that Congress has the power to limit the authority of the President and agency heads over national security matters,[2] it did not do so when it authorized the Board to adjudicate adverse action appeals. If in 1978 Congress meant to alter longstanding arrangements and delegations by giving the Board the power to overrule an agency head's judgment about the threat a particular employee poses to national security, one would expect a clear indication of such an intention. I find no such indication. In fact, given that Congress instructed the Board to review adverse actions under the "efficiency of the service" standard and not any standard related to national security, *see* 5 U.S.C. § 7513(a), it is reasonable to infer that Congress did not intend to allow the Board to review an agency head's judgment on national security matters.

III. The Board should not review the reasons underlying an agency's determination that an employee is ineligible to occupy a sensitive position because doing so creates the possibility of an irreconcilable conflict between a Board order and an agency head's authority under Executive Order No. 10,450.

¶17 In addition to the explanation above, there is a separate reason why the Board should not review the reasons underlying an agency's determination that an employee is no longer eligible for a sensitive position. Executive Order No. 10,450, § 7, provides that --

> Any person whose employment is suspended or terminated under the authority granted to heads of departments and agencies by or in

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[2] The majority observes that under the Constitution, Congress has the power "to declare war," "to raise and support Armies," "to provide and maintain a Navy," and "to make Rules for the Government and Regulation of the land and naval Forces." U.S. Const. Art. I, § 8, cl. 11-14. It does not appear that these broad powers pertain to the classic Executive functions of managing the civilian workforce at military installations and providing for the security of such installations. In any event, despite my doubts, I assume for purposes of this dissent that Congress could create an agency in the Executive branch to review an agency head's determination that retaining a particular employee in a sensitive position would pose a risk to national security. I simply would find that Congress did not intend to do so.

> accordance with the said act of August 26, 1950, or pursuant to the said Executive Order No. 9835 or any other security or loyalty program relating to officers or employees of the Government, shall not be reinstated or restored to duty or reemployed in the same department or agency and shall not be reemployed in any other department or agency, unless the head of the department or agency concerned finds that such reinstatement, restoration, or reemployment is clearly consistent with the interests of the national security[.]

This restriction on reinstatement also appears in Department of Defense regulations. *See* 32 C.F.R. § 154.57(a).

¶18 If the Board reviewed the reasons underlying an agency's determination that an employee is no longer eligible for a sensitive position, and if it found those reasons unproven, ostensibly it would order cancellation of the employee's removal. As explained in Part II above, however, the Board's decision would be based on application of the "efficiency of the service" standard and not on the relevant "interests of national security" standard under Executive Order No. 10,450. Thus, even after the Board's decision, there would remain the undisturbed judgment of the agency that the individual's continued employment would not be consistent with the interests of national security. Under such circumstances, the agency head would be derelict in his responsibility under Executive Order No. 10,450 if he allowed the individual's reinstatement, yet he would be in violation of a Board order if he denied reinstatement.

¶19 I see no way to resolve this conflict. If the Board undertakes a review of the reasons underlying an agency's determination that an employee is no longer eligible for a sensitive position, it may be conducting empty process resulting in an unenforceable Board order.

CONCLUSION

¶20 For the reasons given above, I would hold that the Board cannot review the reasons underlying an agency's determination that an employee is no longer

eligible to occupy a position that the agency has designated "sensitive" under Executive Order No. 10,450 and its implementing regulations at 5 C.F.R. § 732.201(a). Before today those reasons have never been subject to third-party review, and I am unwilling to make this the first such case. Assuming for the sake of discussion that Congress could, consistent with the Constitution, empower the Board to review the reasons underlying an agency's determination that an employee is no longer eligible to occupy a sensitive national security position, there is no indication that it gave the Board such authority.

Mary M. Rose
Member

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2010 MSPB 248

Docket No. AT-0752-10-0184-I-1

Devon Haughton Northover,

Appellant,

v.

Department of Defense,

Agency.

December 22, 2010

Andres M. Grajales, Esquire, Washington, D.C., for the appellant.

Stacey Turner Caldwell, Esquire, Fort Lee, Virginia, for the agency.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman
Mary M. Rose, Member
Member Rose issues a dissenting opinion.

OPINION AND ORDER

¶1 This appeal is before the Board on interlocutory appeal from the April 2, 2010 order of the chief administrative judge (CAJ) of the Board's Atlanta Regional Office. The CAJ stayed the proceedings and certified for Board review his ruling that he would apply the limited scope of Board review set forth in *Department of the Navy v. Egan*, 484 U.S. 518, 530-31 (1988), in adjudicating the appellant's reduction in grade. For the reasons discussed below, we REVERSE the CAJ's ruling, VACATE the stay order, and RETURN the appeal to the CAJ for further adjudication consistent with this Opinion and Order.

BACKGROUND[1]

¶2 Effective December 6, 2009, the agency reduced the appellant in grade from the competitive service position of GS-1144-07 Commissary Management Specialist (CAO) to part-time GS-1101-04 Store Associate at the Defense Commissary Agency (DCA).[2] Interlocutory Appeal File (IAF), Tab 4, Subtabs 4b, 4d, 4e. The agency took the action "due to revocation/denial of your Department of Defense eligibility to occupy a sensitive position." *Id.*, Subtab 4e at 1. In its notice of proposed demotion, the agency stated that the appellant was in a position which was "designated as a sensitive position," and that its Washington Headquarters Services (WHS), Consolidated Adjudications Facility (CAF) had denied him "eligibility for access to classified information and/or occupancy of a sensitive position." *Id.*, Subtab 4h at 1.

¶3 The appellant filed a Board appeal of his reduction in grade. IAF, Tab 1. In responding to the appeal, the agency asserted that: (1) Pursuant to Executive Order No. 10,450, as amended, and 5 C.F.R. Part 732, it had designated the Commissary Management Specialist (CAO) position a "moderate risk" national security position with a sensitivity level of "non-critical sensitive" (NCS); (2) under *Egan,* the Board is barred from reviewing the merits of an agency's "security-clearance/eligibility determination;" and (3) the *Egan* limited scope of Board review applies to the decision to deny an individual eligibility to occupy a national security position. *Id.*, Tab 4, Subtab 1 at 1, 4-5.

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[1] In deciding this interlocutory appeal, we have relied on the current evidentiary record, the undisputed allegations of the parties, and the parties' stipulations. Because the record is not fully developed, the CAJ should reopen the record when deciding the appeal. Except for the parties' stipulations, he may reexamine any factual matter mentioned in this Opinion and Order. *See, e.g., Olson v. Department of Veterans Affairs*, 92 M.S.P.R. 169, ¶ 2 n.I (2002).

[2] The appellant was a permanent employee with a service computation date of September 8, 2002. Interlocutory Appeal File, Tab 4, Subtab 4b.

¶4 On April 2, 2010, the CAJ issued a Ruling on Motions for Clarification of Burdens of Proof and Certification for Interlocutory. IAF, Tab 16. He noted that the agency contended the limited scope of Board review set forth in *Egan* applied to this appeal and that the appellant urged the Board not to apply or expand *Egan*. *Id.* at 1-2. The CAJ ruled that he was bound by the *Egan* limitations and certified his ruling to the Board on his own motion after finding that the regulatory requirement for certifying his ruling had been satisfied. He stayed the proceeding pending the Board's resolution of the certified issue. *Id.* at 3.

¶5 The Board found that this interlocutory appeal presented the same legal issue as that presented by the interlocutory appeal in *Conyers v. Department of Defense*, MSPB Docket Nos. CH-0752-09-0925-I-1 and CH-0752-09-0925-I-2. The Board determined that, before deciding these appeals, it was appropriate to permit the Office of Personnel Management (OPM) and interested amici to express their views on the issue. The Board therefore asked OPM to provide an advisory opinion interpreting its regulations in 5 C.F.R. Part 732, National Security Positions. IAF, Tab 6. In doing so, the Board stated that the appellant occupied a position that the agency had designated NCS pursuant to 5 C.F.R. § 732.201(a), *id.* at 1,[3] and that the appeal "raise[d] the question of whether, pursuant to 5 C.F.R. Part 732, National Security Positions, the rule in *Egan* also applies to an adverse action concerning a [NCS] position due to the employee having been denied continued eligibility for employment in a sensitive position," *id.* at 2. The Board also issued a notice of opportunity to file amicus briefs in these appeals. 75 Fed. Reg. 6728 (Feb. 10, 2010). OPM submitted an advisory

[3] The CAJ found that the agency had classified the Commissary Management Specialist (CAO) position as NCS, IAF, Tab 16 at 2, and the Board repeated this in its request to OPM, *id.*, Tab 6. The appellant asserted, however, that his position was not classified as NCS. *See, e.g.*, IAF, Tab 14 at 1 n.1, Tab 22, Comments at 6 n.1. Because of the interlocutory appeal, the parties were not given an adequate opportunity to address this factual matter below. Therefore, if necessary, the CAJ should address the issue on return of this appeal.

opinion and a supplementary letter, five amici submitted briefs,[4] and the parties submitted additional argument. IAF, Tabs 8-11, 13-15, 21-22.

¶6 On September 21, 2010, the Board held oral argument in *Conyers* and *Northover*.[5] The Board heard argument from the appellants' representative, the agency's representatives, and representatives for the amici from the Government Accountability Project and the National Treasury Employees Union.[6] The Board allowed the parties and amici to submit written closing arguments by October 5, 2010. Tr. at 79; IAF, Tab 44. The parties, the National Treasury Employees Union, and the Government Accountability Project submitted closing arguments. IAF, Tabs 45-46, 48-49. In addition, on October 5, 2010, the Office of the Director of National Intelligence (ODNI), Office of General Counsel requested an opportunity to file an "advisory opinion," *id.*, Tab 47, and the Board granted ODNI an opportunity to submit a statement presenting its position, *id.*, Tab 50. The Board also provided the parties and amici with an opportunity to reply to ODNI's filing. *Id.* ODNI filed a statement and the appellant filed a response to the statement. *Id.*, Tabs 51, 52. The record closed on October 25, 2010. *Id.*, Tab 50. The Board has considered the entire record in ruling on this interlocutory appeal.

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[4] The five amici are the American Federation of Government Employees, which also represents the appellant; the National Treasury Employees Union; the National Employment Lawyers Association/Metropolitan Washington Employment Lawyers Association; the Equal Employment Opportunity Commission; and the Government Accountability Project. IAF, Tab 8-11, 13.

[5] The agency submitted several motions to dismiss the appeal as moot, which were opposed by the appellant. The Board denied these motions on the basis that the agency failed to meet the criteria for finding the appeal moot. IAF, Tabs 28-29, 35-36, 42-44. While continuing to so argue, *id.*, Tab 46, Br. at I n.1, the agency has nevertheless failed to demonstrate that this appeal is moot for the reasons the Board explained in its previous orders. If necessary, the CAJ should address the mootness issue on return of this appeal.

[6] OPM declined the Board's invitation to present oral argument. IAF, Tab 31, Transcript (Tr.) at 4.

ANALYSIS

The CAJ properly certified his ruling for review on interlocutory appeal.

¶7 An interlocutory appeal is an appeal to the Board of a ruling made by an administrative judge during a proceeding. An administrative judge may certify an interlocutory appeal if he determines that the issue presented is of such importance to the proceeding that it requires the Board's immediate attention. Either party may make a motion for certification of an interlocutory appeal, or the administrative judge may certify an interlocutory appeal on his own motion. If the appeal is certified, the Board will decide the issue and the administrative judge will act in accordance with the Board's decision. *See* 5 C.F.R. § 1201.91.

¶8 An administrative judge will certify a ruling for review if the record shows that the ruling involves an important question of law or policy about which there is substantial ground for difference of opinion; and an immediate ruling will materially advance the completion of the proceeding, or the denial of an immediate ruling will cause undue harm to a party or the public. *See* 5 C.F.R. § 1201.92. An administrative judge has the authority to stay the hearing while an interlocutory appeal is pending with the Board. 5 C.F.R. § 1201.93(c).

¶9 We find that the requirements for certifying a ruling on interlocutory appeal have been satisfied in this appeal. Previously, in *Crumpler v. Department of Defense*, 113 M.S.P.R. 94 (2009),[7] the Board recognized that the legal issue presented here would have potentially far-reaching implications across the federal civil service. *Id.*, ¶ 6. Thus, the CAJ's ruling involves an important question of law or policy. Moreover, we find that there is substantial ground for difference of opinion concerning the question of whether the limited scope of Board review set forth in *Egan* applies here and that an immediate ruling will materially advance the completion of the proceeding. Therefore, the CAJ properly certified

[7] A settlement agreement was reached in *Crumpler* before the Board had the occasion to address the issue.

his ruling for review on interlocutory appeal. *See, e.g., Fitzgerald v. Department of the Air Force*, 108 M.S.P.R. 620, ¶ 6 (2008).

This appeal does not warrant application of the limited Board review prescribed in *Egan*.

¶10 In creating the Merit Systems Protection Board, Congress expressly mandated that the Board adjudicate all matters within its jurisdiction. 5 U.S.C. § 1204. Congress further provided that an employee, as defined in 5 U.S.C. § 7511, against whom certain adverse actions are taken, has the right to invoke the Board's jurisdiction under 5 U.S.C. § 7701. 5 U.S.C. § 7513(d). Such appealable adverse actions include reductions in grade. 5 U.S.C. § 7512(3). Congress also clearly delineated the scope of our review in non-performance adverse action appeals by requiring that the Board determine whether the agency's decision is supported by preponderant evidence and promotes the efficiency of the service, and whether the agency-imposed penalty is reasonable. *See* 5 U.S.C. §§ 7513(a); 7701(b)(3) and (c)(1);[8] *Gregory v. Department of Education*, 16 M.S.P.R. 144, 146 (1983). More specifically, in appeals such as this, when the charge involves an agency's withdrawal of its certification or approval of an employee's fitness or other qualification for the position, the Board has consistently recognized that its adjudicatory authority extends to a review of the merits of that withdrawal. *See Adams v. Department of the Army*, 105 M.S.P.R. 50, ¶ 10 (2007), *aff'd*, 273 F. App'x 947 (Fed. Cir. 2008).

¶11 The instant appeal falls squarely within our statutory jurisdiction. Specifically, at the time of the action giving rise to this matter, the appellant had been a permanent employee in the competitive service with a service computation date of September 8, 2002. IAF, Tab 4, Subtab 4b. He therefore comes within

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[8] The Board's review may also include assessing whether, when taking the adverse action, an agency has engaged in a prohibited personnel practice such as, e.g., race discrimination, disability discrimination, or reprisal for protected whistleblowing. 5 U.S.C. §§ 7701(c)(2)(B), 2302(b).

the definition of "employee" in 5 U.S.C. §§ 7511(a)(1)(A)(ii), which the agency does not dispute. On December 6, 2009, DCA reduced him in grade from his position of GS-1144-07 Commissary Management Specialist (CAO) to part-time GS-1101-04 Store Associate. *Id.*, Subtabs 4b, 4d, 4e. That reduction in grade constitutes an appealable action under 5 U.S.C. §§ 7512(3), 7513(b).

¶12 The agency contends, however, that because this appeal involves the denial of eligibility to occupy an NCS position, it is subject only to the limited review prescribed by the Supreme Court in *Egan*. IAF, Tab 4, Subtab 1 at 4-5, Tab 5, Resp. at 1-2, Tab 46, Br. at 1-4, 7-10. In *Egan*, the Court limited the scope of Board review in an appeal of an adverse action based on the revocation or denial of a "security clearance." There, the Court held that the Board lacks the authority to review the substance of the security clearance determination, or to require the agency to support the revocation or denial of the security clearance by preponderant evidence, as it would be required to do in other adverse action appeals. Rather, the Court found that the Board has authority to review only whether the employee's position required a security clearance, whether the clearance was denied or revoked, whether the employee was provided with the procedural protections specified in 5 U.S.C. § 7513, and whether transfer to a nonsensitive position was feasible. 484 U.S. at 530-31; *see also Hesse v. Department of State*, 217 F.3d 1372, 1376 (Fed. Cir. 2000).

¶13 During the course of this interlocutory appeal, the parties stipulated[9] as follows concerning security clearances and access to classified information:

> The parties agree that the positions held by appellants Conyers and Northover did not require the incumbents to have a confidential, secret or top secret clearance. The parties also agree that the positions held by appellants Conyers and Northover did not require the incumbents to have access to classified information.

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[9] Parties may stipulate to any matter of fact, and the stipulation will satisfy a party's burden of proving the fact alleged. *See* 5 C.F.R. § 1201.63.

IAF, Tab 27. In other words, the appellant is not required to have a security clearance and he is not required to have access to classified information. Therefore, we conclude that *Egan* does not limit the Board's statutory authority to review the appellant's reduction in grade appeal. We further conclude that *Egan* limits the Board's review of an otherwise appealable adverse action only if that action is based upon a denial, revocation, or suspension of a "security clearance," i.e., involves a denial of access to classified information or eligibility for such access, as we more fully explain below.

¶14 We therefore direct the CAJ, on return of this appeal, to conduct a hearing consistent with the Board's statutory duty to determine whether the appellant's reduction in grade is supported by a preponderance of the evidence, promotes the efficiency of the service and constitutes a reasonable penalty. *See* 5 U.S.C. §§ 7513(a), 7701(b)(3) and (c)(1). As contemplated by the Board's statutory mandate and our precedent, this adjudicatory authority extends to a review of the merits of the agency's denial of the appellant's eligibility to occupy an NCS position. *See Adams*, 105 M.S.P.R. 50, ¶ 10.

¶15 In *Egan,* the Court characterized its decision as addressing the "*narrow question* presented by this case [namely] whether the [Board] has authority by statute to review the substance of an underlying decision to deny or revoke a security clearance in the course of reviewing an adverse action." 484 U.S. at 520 (emphasis added). In holding that it did not, the Court relied primarily on the premise that the President, as Commander in Chief under the Constitution, had authority to classify and control access to information bearing on national security and that such authority exists apart from any explicit Congressional grant. It concluded therefore that "the grant of security clearance to a particular employee . . . is committed by law to the appropriate agency of the Executive Branch." *Id.* at 527. The Court thus found that "'an agency head who must bear the responsibility for the protection of classified information committed to his custody should have the final say in deciding whether to repose his trust in an

employee who has access to such information.'" *Id.* (quoting *Cole v. Young*, 351 U.S. 536, 546 (1956)).

¶16 We believe that the *Egan* Court's limitation of the Board's statutory review authority must be viewed narrowly, most obviously because the Court itself so characterized its holding in that case. Moreover, the Court's rationale rested first and foremost on the President's constitutional authority to "classify and control access to information bearing on national security" and does not, on its face, support the agency's effort here to expand the restriction on the Board's statutory review to any matter in which the government asserts a national security interest. *Egan*, 484 U.S. at 527-528. In fact, although Mr. Egan held a position that was designated as NCS, *Egan*, 484 U.S. at 521, the Court's limitation of Board review was based on the requirement that he hold a security clearance and on the government's need to protect the classified information to which he had access. *Id.* at 527-30. Nothing in *Egan* indicates that the Court considered the NCS designation alone as sufficient to preclude Board review of the merits of the determination underlying Mr. Egan's removal.[10]

¶17 Nor is there any basis upon which to assume that the Court in *Egan* used the term "security clearance" to mean anything other than eligibility for access to, or access to, classified information. In that regard, we note that the words "security clearance" historically have been used as a term of art referring to access to classified information, and they are not synonymous with eligibility to occupy a sensitive position. *See, e.g., Jones v. Department of the Navy*, 978 F.2d

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[10] In *Egan*, the Department of the Navy's designation of a position as "noncritical-sensitive" was defined by the applicable Chief of Naval Operations Instruction to include "[a]ccess to Secret or Confidential information." 484 U.S. at 521 n.1. By contrast, here, the agency's designation of the appellant's position as NCS pursuant to OPM regulations includes no such requirement for access to, or eligibility for access to, any classified information. Indeed, the parties stipulated that the appellant is not required to have a security clearance and he has no need for access to any classified information.

1223, 1225 (Fed. Cir. 1992) (quoting *Hill v. Department of the Air Force*, 844 F.2d 1407, 1411 (10th Cir. 1988) and describing a "security clearance [as] merely temporary permission by the Executive for access to national secrets"). The agency's use of the term "security clearance" "in the vernacular" to refer to all background investigations, Tr. at 40-42, and its assertion that "security clearance decisions are but one variety of agency national security determinations," IAF, Tab 46, Br. at 2, does not change the meaning of "security clearance" as determined by the Court in *Egan*.

¶18 Executive Order No. 12,968 (Aug. 2, 1995) ("Access to Classified Information"), although failing to provide an explicit definition of "security clearance," pertinently provides that "[n]o employee shall be granted access to classified information unless that employee has been determined to be eligible in accordance with this order and to possess a need-to-know." *Id.*, Section 1.2 (a). Executive Order No. 12,968 further provides that employees shall not be granted access to classified information unless they have: (1) Been determined "eligible" for access by "agency heads or designated officials" under Section 3.1 "based on a favorable adjudication of an appropriate investigation of the employee's background;" (2) a demonstrated need-to-know; and (3) signed a nondisclosure agreement. *Id.*, Section 1.2(c)(1)-(3). The Department of Defense Personnel Security Program Regulation, consistent with the above, defines "security clearance" as "[a] determination that a person is eligible under the standards of [32 C.F.R. Part 154] for access to classified information." 32 C.F.R. § 154.3(t). We thus conclude that *Egan* limits the Board's statutory review of an appealable adverse action only when such review would require the Board to review the substance of the "sensitive and inherently discretionary judgment call . . . committed by law to the . . . Executive Branch" when an agency has made a determination regarding an employee's access to classified information, i.e., a decision to deny, revoke or suspend access, or eligibility for access to classified

information. *Egan*, 484 U.S. at 527. Our use of the term "security clearance" in this Opinion and Order includes this specific understanding.[11]

¶19 Furthermore, prior to the Board's now vacated decision in *Crumpler v. Department of Defense*, 112 M.S.P.R. 636 (2009), *vacated*, 113 M.S.P.R. 94 (2009), the Board had long considered *Egan*'s restriction on its statutory review as confined to adverse actions based on security clearance revocation and refused to extend the restriction to non-security clearance appeals where the actions arguably implicated national security. *See, e.g., Jacobs v. Department of the Army*, 62 M.S.P.R. 688 (1994); *Adams*, 105 M.S.P.R. 50. In *Jacobs*, the Board held that it had the authority to review a security guard's disqualification from the Chemical Personnel Reliability Program based on his alleged verbal assault of a security officer. 62 M.S.P.R. at 689-90, 694. The Board stated:

> The role of protecting that national chemical weapons program is, without doubt, a very important role. The importance of that role, however, should not divest civilian employees who work in that program of the basic employment protections guaranteed them under law. Neither should the 'military' nature of such employment, nor should the program's requirements for the ability to react to changing situations with dependability, emotional stability, proper social adjustment, sound judgment, and a positive attitude toward program objectives and duly constituted authority.

Id. at 694. The Board explicitly found as follows:

> The Supreme Court's decision in *Egan* was narrow in scope and specifically applied only to security clearance revocations. As the

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[11] Member Rose suggests in dissent that when the *Egan* Court used the term "security clearance," it did not use it as a term of art limited to the grant of access to, or eligibility for access to, classified information. Rather, she suggests that *Egan*, "when read as a whole," shows that the Court was more generally concerned with any "discretionary national security judgments committed to agency heads, regardless of whether the employee ... needed access to classified information as part of his job." As we thoroughly explain in our opinion today, such an expansive reading of *Egan* ignores the facts and much of the analysis in *Egan*, numerous decisions of the Federal Circuit and Board interpreting *Egan* over the last 20 years, as well as the definition of security clearance found in the Department of Defense's own regulations.

> protector of the government's merit systems, the Board is not eager to expand the scope of the rationale in *Egan* to divest federal employees whose positions do not require a security clearance of basic protections against non-meritorious agency actions.

Id. at 695.

¶20 In *Jacobs*, the Board further addressed the agency's concern, expressed also in this appeal, IAF, Tab 46, Br. at 3-4, 7, that, as an outside non-expert body, the Board should not second-guess its attempts to predict the appellant's future behavior. The Board found that most of the removal actions taken by agencies are based at least in part on an attempt to predict an employee's future behavior. It noted that, in *Douglas v. Veterans Administration*, 5 M.S.P.R. 280, 305-06 (1981), the Board set forth a range of factors that an agency should consider in making a penalty determination, which included an estimate of the employee's rehabilitation potential. The Board found that the basis of progressive discipline is that an employee who has engaged in repeated misconduct will be likely to do so again in the future. Thus, when an agency acts based on such predictive judgments in imposing a penalty, the Board is required by its statutory mandate to evaluate the propriety of those agency judgments.[12] *Douglas* and *Jacobs* are not isolated cases, as the Board's case law is replete with decisions in which the Board has reviewed an agency's predictions regarding an employee's future conduct and potential for rehabilitation. *Jacobs*, 62 M.S.P.R. at 695.

¶21 Similarly, in *Adams*, the Board found that *Egan* did not preclude its review of the propriety of the agency's denial of access to sensitive personnel information in an appeal of a human resources assistant's removal for "failure to maintain access to the Command computer system." 105 M.S.P.R. 50, ¶¶ 6, 9-12. The Board acknowledged the agency's argument, similar to that made in this appeal, IAF, Tab 46, Br. at 1-4, 7-10, that the suspension of computer access was

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[12] The record before us lacks evidence of any "delicate national security judgments that are beyond [the Board's] expertise" as suggested by the dissent.

not an appealable adverse action, that the federal government had not waived its sovereign immunity from challenges to such actions, and that the Board's authority to review those actions was barred under *Egan*. *Adams*, 105 M.S.P.R. 50, ¶ 9. But the Board found no merit to those arguments. It noted that the agency did not deny that, in 5 U.S.C. § 7513, Congress has authorized the Board to adjudicate removals. As previously noted, it found that adjudication of such an appeal requires the Board to determine whether the agency has proven the charge or charges on which the removal is based; and, when the charge consists of the employing agency's withdrawal or revocation of its certification or other approval of the employee's fitness or other qualifications to hold his position, the Board's authority generally extends to a review of the merits of that withdrawal or revocation. *Id.*, ¶ 10.

¶22 In *Adams*, the Board acknowledged "narrow exceptions" to the Board's authority to review the merits of agency determinations underlying adverse actions, and found that one such exception was addressed in *Egan*. It distinguished *Egan*, however, as follows:

> The present appeal does not involve the national security considerations presented in *Egan*. While the agency's computer system provides employees with access to sensitive information, the agency has acknowledged that the information is not classified and has indicated that it does not consider access to that information to be equivalent to possession of a security clearance. . . . The decision to suspend the appellant's computer access is similar instead to determinations the Board has found it has the authority to review.

Adams, 105 M.S.P.R. 50, ¶ 12.[13]

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[13] In addition to *Jacobs* and *Adams*, the Board has held that, despite *Egan*, it has the authority to review the decision of an agency credentials committee to revoke an employee's clinical privileges, when that revocation was the basis for the employee's removal, *Siegert v. Department of the Army*, 38 M.S.P.R. 684, 687-91 (1988); and to review the validity of a medical determination underlying the removal of an air traffic control specialist, *Cosby v. Federal Aviation Administration*, 30 M.S.P.R. 16, 18-19 (1986).

¶23 In addition to our longstanding precedent, however, we are guided by the Supreme Court's opinion in *Cole v. Young*, 351 U.S. 536 (1956),[14] cited with approval in *Egan,* 484 U.S. at 529, which provides persuasive and considerable support for viewing *Egan* as narrowly limited to appeals involving security clearances. There, the Court addressed whether the removal of a preference-eligible veteran employee of the Department of Health, Education, and Welfare was authorized under the Act of August 26, 1950 (the Act).[15] In ruling that

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[14] Member Rose sees little value in the Supreme Court's *Cole* decision, in part because it was decided in 1956, "22 years before the Civil Service Reform Act." As we note in our decision, though, *Cole* specifically addressed the "Act of August 26, 1950," the predecessor to 5 U.S.C. § 7532. Further, Executive Order No. 10,450, significantly relied on by the dissent, was promulgated in 1953 to implement the 1950 Act. In addition, the relevant regulations issued by OPM, and relied on by Member Rose to find that the Board lacks authority to review the adverse action at issue, are based on Executive Order No. 10,450, and OPM has advised the Board that the regulations do not create or diminish any employee appeal rights.

[15] The Act was the precursor to 5 U.S.C. § 7532 and gave to the heads of certain government departments and agencies summary suspension and unreviewable dismissal powers over civilian employees when deemed necessary "in the interest of the national security of the United States." This express provision within the Civil Service Reform Act (CSRA) for accommodating national security concerns further undermines the agency's claim that the President's constitutional authority as Commander in Chief preempts our statutory review. The argument is tenuous, at best, insofar as it rests upon the misguided premise that the President alone possesses power in the area of national security. Instead, the Constitution gives Congress the power "to declare war" (Art. 1, sec. 8, cl. 11), "to raise and support Armies" (Art. 1, sec. 8, cl. 12), "to provide and maintain a Navy" (Art. 1, sec. 8, cl. 13), and "to make Rules for the Government and Regulation of the land and naval Forces" (Art. 1, sec. 8, cl. 14), and, thus, plainly establishes that Congress also has authority with regard to ensuring national security. *Cf. U.S. v. North*, 708 F. Supp. 380, 382 (D.D.C. 1988) (in rejecting the plaintiff's constitutional argument that "the asserted primacy of the White House in foreign affairs" precludes prosecution for false Congressional testimony, the court looked to various constitutional provisions in recognizing that "Congress surely has a role to play in aspects of foreign affairs....")

The CSRA is the comprehensive scheme created by Congress governing federal employment. *See U.S. v. Fausto*, 484 U.S. 439, 443 (1988). In 5 U.S.C. § 7532, Congress expressly delineated those areas where Board review is circumscribed due to national security concerns. There is no evidence that Congress intended that the President could unilaterally and broadly expand these exceptions so as to effectively

Executive Order No. 10,450[16] did not trump the employee's statutory veterans' preference rights, the *Cole* Court interpreted "national security" as used in the Act.[17] *Cole*, 351 U.S. at 538. Significantly, in so doing, the *Cole* Court did not avoid review of the removal or identify any rule of limited review merely because the Executive Branch of the government alleged that matters of "national security" were at issue.[18] Moreover, although the Court determined that an employee may be dismissed using the summary procedures and unreviewable dismissal power authorized by the 1950 statute only if he occupied a "sensitive" position, the Court plainly equated having a "sensitive" position with having access to classified information. *Id.* at 551, 557 n.19. The *Cole* decision thus clearly supports the Board's determination that its statutory jurisdiction over an

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eliminate Board and judicial review of the reasons underlying adverse actions taken against federal employees, such as the appellant, whose positions do not require access, or eligibility for access, to classified information. Absent any indication that Congress contemplated and ordained such a result, we believe that *Egan's* exception to the Board's statutory jurisdiction must be read narrowly.

[16] Executive Order No. 10,450 was promulgated in April 1953 to provide uniform standards and procedures for agency heads in exercising the suspension and dismissal powers under the 1950 Act. *Cole*, 351 U.S. at 551. It also extended the Act to other agencies. *See id.* at 542.

[17] The Supreme Court's *Cole* decision and its decision in *National Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989), plainly contradict the dissent's bold claim that an agency's decision "that retaining an employee would be inconsistent with the interests of national security has never been subject to third-party review before today." In both cases, the Court subjected agency claims regarding national security to judicial scrutiny. *See also* note 19 *supra*.

[18] The *Cole* Court notably stated that it would not lightly assume that Congress intended to take away the normal dismissal procedures of employees "in the absence of some overriding necessity, such as exists in the case of employees handling defense secrets." 351 U.S. at 546-47.

otherwise appealable action cannot be preempted by an agency's generalized claim of "national security."[19]

¶24 In this regard, we agree with the appellants that the potential impact of the agency's argument that *Egan* precludes the Board from reviewing the merits of an agency's adverse action, even when security clearances are not involved, is far-reaching. Accepting the agency's view could, without any Congressional mandate or imprimatur, preclude Board and judicial review of alleged unlawful discrimination, whistleblower retaliation, and a whole host of other constitutional and statutory violations for multitudes of federal employees subjected to otherwise appealable removals and other adverse actions. *See El-Ganayni v. Department of Energy*, 591 F.3d 176, 184-186 (3d Cir. 2010) (First Amendment claim and Fifth Amendment Equal Protection claim must be dismissed because legal framework would require consideration of the reasons a security clearance was revoked); *Bennett v. Chertoff*, 425 F.3d 999, 1003-04 (D.C. Cir. 2005) (adverse action based on denial or revocation of a security clearance not actionable under Title VII of the Civil Rights Act of 1964); *Hesse*, 217 F.3d at 1377 (*Egan* precludes Board review of Whistleblower Protection Act whistleblower claims in indefinite suspension appeal); *Ryan v. Reno*, 168 F.3d 520, 524 (D.C. Cir. 1999) (adverse action based on denial of a security clearance not actionable under Title VII of the Civil Rights Act of 1964); *Jones*, 978 F.2d at 1225-26 (no employee has a "property" or "liberty" interest in a security

[19] In fact, even in cases where the Executive Branch has sought to defend its action on the grounds of protecting classified information, the Court has not abstained from subjecting such assertions to searching judicial scrutiny. *See e.g., National Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989). There, employees challenged the Customs Service decision to subject whole categories of employees to random drug-testing on the basis of their presumed access to classified information. Deeming the record insufficient to determine whether the agency overreached, the Court remanded to the Fifth Circuit with instructions to "examine the criteria used by the [Customs] Service in determining what materials are classified and in deciding whom to test under this rubric." *Id.* at 678.

clearance or access to classified information and thus no basis for a constitutional right); *Pangarova v. Department of the Army*, 42 M.S.P.R. 319, 322-24 (1989) (*Egan* precludes the Board from reviewing discrimination or reprisal allegations intertwined with the agency's denial of a security clearance).

¶25 Therefore, we find that the Supreme Court's decision in *Egan* does not support the conclusion that the Board lacks the authority to review the determination underlying the agency's reduction in grade here.[20] The Board may exercise its full statutory review authority and review the agency's determination that the appellant is no longer eligible to hold a "sensitive" position, because this appeal does not involve a discretionary agency decision regarding a security clearance.[21]

The agency's decision to characterize the appellant's position as a national security position and to designate it NCS is insufficient to limit the Board's scope of review to that set forth in *Egan*.

¶26 In 5 C.F.R. Part 732, OPM set forth "certain requirements and procedures which each agency shall observe for determining national security positions pursuant to Executive Order No. 10450 – Security Requirements for Government Employment (April 27, 1953), 18 FR 2489, 3 CFR 1949-1953 Comp., p. 936, as

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[20] We are not finding that the Board has the authority to determine whether the agency has properly designated the appellant's position as NCS. *See Skees v. Department of the Navy*, 864 F.2d 1576, 1578 (Fed. Cir. 1989) (Board lacks the authority to review an agency's determination that a position requires a security clearance); *Brady v. Department of the Navy*, 50 M.S.P.R. 133, 138 (1991) (Board lacks the authority to review an agency's determination to designate a position as NCS). We are simply finding that the agency's decision to designate a position as a "national security" position or as a "sensitive" one, standing alone, does not limit the Board's statutory review authority over an appealable adverse action.

[21] We recognize that Congress has specifically excluded groups of employees from having Board appeal rights or from having protection against prohibited personnel practices, such as employees of the Central Intelligence Agency, the Federal Bureau of Investigation, and intelligence components of the Department of Defense. *See* 5 U.S.C. §§ 2303(a)(2)(C), 7511(b)(7), (8). Congress has not similarly excluded the agency in the current appeal.

amended." 5 C.F.R. § 732.101. OPM's regulations state that the term "national security position" includes:

> (1) Those positions that involve activities of the Government that are concerned with the protection of the nation from foreign aggression or espionage, including development of defense plans or policies, intelligence or counterintelligence activities, and related activities concerned with the preservation of the military strength of the United States; and
>
> (2) Positions that require regular use of, or access to, classified information.

5 C.F.R. § 732.102(a). The regulations further provide:

> For purposes of this part, the head of each agency shall designate, or cause to be designated, any position within the department or agency the occupant of which could bring about, by virtue of the nature of the position, a material adverse effect on the national security as a sensitive position at one of three sensitivity levels: Special-Sensitive, Critical-Sensitive, or Noncritical-Sensitive.

5 C.F.R. § 732.201(a). The agency argues that, although the appellant's position did not require a security clearance, the Board is nevertheless precluded under *Egan* from reviewing whether he was improperly reduced in grade based upon the agency's determination that he was ineligible to occupy a national security position. IAF, Tab 4, Subtab 1 at 4-5, Tab 5, Resp. at 1-2, Tab 46, Br. at 1-4, 7-10. We disagree.

¶27 OPM's interpretation of its own regulations at 5 C.F.R. Part 732 supports the conclusion that our review of an adverse action is not limited by *Egan* solely based on the agency's designation of the position as a national security position or as "sensitive." In that regard, OPM has not interpreted its regulations to preclude the usual scope of Board review for adverse actions taken against employees based on ineligibility to occupy NCS positions. Rather, OPM concluded that the Board cannot determine the scope of its review by referring to 5 C.F.R. Part 732. IAF, Tab 15, Advisory Op. at 3. OPM stated:

> OPM's regulations in 5 C.F.R. Part 732 are silent on the scope of an employee's rights to Board review when an agency deems the

> employee ineligible to occupy a sensitive position. The regulations do not independently confer any appeal right or affect any appeal right under law.

Id. at 2. It similarly stated concerning its regulations:

> [T]hey do not address the scope of the Board's review when an agency takes an adverse action against an employee under 5 U.S.C. § 7513(a) following an unfavorable security determination. Likewise, OPM's adverse action regulations in 5 C.F.R. Part 752 do not address any specific appellate procedure to be followed when an adverse action follows an agency's determination that an employee is ineligible to occupy a sensitive position.

Id. at 3. Thus, OPM has not interpreted its own regulations as precluding the Board's usual scope of review in these appeals.

¶28 In its October 18, 2010 statement, ODNI refers to Executive Order No. 13,467 (June 30, 2008), in arguing that the limited scope of Board review set forth in *Egan* should apply in this appeal. IAF, Tab 51, Statement at 1. ODNI notes that Executive Order No. 13,467, which is entitled "Reforming Processes Related to Suitability for Government Employment, Fitness for Contractor Employees, and Eligibility for Access to Classified National Security Information," designated the Director of National Intelligence (DNI) as the Security Executive Agent (SEA) for the federal government. *Id.* at 1. It further notes that, in setting forth the SEA's responsibilities relating to overseeing investigations, developing policies and procedures, issuing guidelines and instructions, serving as a final authority, and ensuring reciprocal recognition among agencies, the Executive Order consistently referred to that authority as relating to both determinations of eligibility for access to classified information or eligibility to hold a sensitive position. *Id.* at 1-2. It thus argues that the President has given the DNI "oversight authority over eligibility determinations, whether they entail access to classified information or eligibility to occupy a sensitive position, regardless of sensitivity level." *Id.* at 2.

¶29 ODNI appears to be arguing, as does the agency, that because executive orders refer to both eligibility for access to classified information and eligibility

to occupy a sensitive position -- or because the agency decided to adjudicate determinations involving access to classified information and eligibility to occupy a sensitive position through the same WHS/CAF process -- the same Board review authority must necessarily apply. Neither ODNI nor the agency has shown that such a circular argument provides a basis for limiting the statutory scope of our review in adverse action appeals.

¶30 We therefore find that the Board has the authority to review the merits of the agency's decision to find the appellant ineligible to occupy an NCS position, and that the Board's authority to exercise its statutory review of the appellant's reduction in grade is not limited by *Egan*. Applying the full scope of Board review in appeals such as this will not prevent agencies from taking conduct-based adverse actions or suitability actions in appropriate cases. Likewise, agencies may respond to urgent national security issues, even for employees who do not have eligibility for access to, or access to, classified information, by exercising their statutory authority to impose indefinite suspensions and removals through the national security provisions in 5 U.S.C. § 7532. *See, e.g., King v. Alston*, 75 F.3d 657, 659 n.2 (Fed. Cir. 1996). Here, however, the agency did not choose to act under 5 U.S.C. § 7532, an option the dissent fails to mention. If the agency believed that a Board appeal would involve delicate national security matters beyond the Board's expertise, or that a Board order might create a conflict with its national security obligations pursuant to Executive Order No. 10,450, it could exercise its statutory authority pursuant to 5 U.S.C. § 7532. *See id.*

¶31 Any agency argument that a Board decision to reverse its action would place it in an impossible position, because it must either violate an agency head's decision and allow an employee who presents a national security risk to occupy a sensitive position or violate the Board's order, does not warrant a different outcome. In its motions to dismiss, the agency indicated that it had reinstated the appellant to the Commissary Management Specialist (CAO) position retroactive

to December 6, 2009. IAF, Tabs 28-29, 39, 42. When asked at oral argument why the agency now deemed the appellant eligible to occupy the NCS position, the agency representative stated, "[w]ell, for one thing, litigation." Tr. at 46. The agency representative proceeded to state that the important point was that the head of the agency "determined to grant a waiver of the factors that were represented as risk factors," and that that discretion and responsibility rested solely with him. *Id.*

¶32 However, the record indicates that, in notifying the WHS/CAF Director of his decision overriding its unfavorable security determination and returning the appellant to his position, Acting Director Thomas Milks directed it to act "without delay" "[b]ecause of pending litigation." IAF, Tab 28, Att. 1 at 1. In addition, his determination stated as its first finding that the questions raised concerning the appellant "relate to the grant of access to classified material," and that "no access to classified material is required or permitted in the position to which he is being reassigned." *Id.* at 2. In his second finding, Milks simply summarily stated that "it is unlikely that [the appellant's] assignment to the subject position would result in a material adverse effect on national security." *Id.* Therefore, the agency's own actions do not support any fear of being put in an impossible position by the possibility that the Board might disagree with its decision and order reinstatement.

The interlocutory appeal must be returned to the CAJ for further proceedings.

¶33 Because *Egan*'s limited scope of Board review does not apply in this appeal, Board review of the challenged reduction in grade includes consideration of the underlying merits of the agency's reasons to deny the appellant eligibility to occupy an NCS position. The CAJ should thus adjudicate this appeal under the generally applicable standards the Board applies in adverse action appeals, including the legal principles governing off-duty or on-duty conduct as applicable.

ORDER

¶34 Accordingly, we vacate the stay order issued in this proceeding and return the appeal to the CAJ for further processing and adjudication consistent with this Opinion and Order.

FOR THE BOARD:

William D. Spencer
Clerk of the Board
Washington, D.C.

DISSENTING OPINION OF MARY M. ROSE

in

Devon Haughton Northover v. Department of Defense

MSPB Docket No. AT-0752-10-0184-I-1

¶1 For the reasons fully set forth in my dissenting opinion in *Conyers v. Department of Defense*, MSPB Docket Nos. CH-0752-09-0925-I-1 & CH-0752-09-0925-I-2 (December 22, 2010), I would hold that the Board lacks authority to review the reasons underlying the agency's determination that the appellant is no longer eligible to hold his GS-1144-07 Commissary Management Specialist position, which the agency designated "sensitive" under Executive Order No. 10,450 and 5 C.F.R. § 732.201(a).

Mary M. Rose
Member

CERTIFICATE OF COMPLIANCE WITH FEDERAL RULE OF APPELLATE PROCEDURE 32(A)

I hereby certify that this brief complies with the requirements of Fed. R. App. P. 32(a)(5) and (6) because it has been prepared in 14-point Garamond, a proportionally spaced font.

I further certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 13,815 words excluding the parts of the brief exempted under Rule 32(a)(7)(B)(iii) and Federal Circuit Rule 32(b), according to the count of Microsoft Word.

s/ *Abby C. Wright*
Abby C. Wright
Counsel for Acting Director, OPM

CERTIFICATE OF SERVICE

I hereby certify that on May 6, 2013, I filed and served the foregoing by CM/ECF and by thereafter causing thirty copies and an original to be delivered to the Clerk of the Court by hand delivery, as requested by the Clerk. I also caused two copies to be mailed by overnight Federal Express or delivered by hand delivery to the following:

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s/ Abby C. Wright
Abby C. Wright
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Enclosure Enclosure

Responses to Posthearing Questions for the Record
Submitted to Ms. Brenda Farrell
From Senator Jon Tester

"Safeguarding Our Nation's Secrets: Examining the National Security Workforce"
November 20, 2013

1. **Would it be useful to create metrics to monitor how agencies apply this guidance and ensure federal agencies won't inappropriately designate as sensitive positions without a credible national security risk? If not, how else will we know if further clarification is necessary or whether agencies are falling on the side of more or less designations under the current guidance?**

As you know from my prior testimony before this subcommittee, we have emphasized a need to build quality and quality monitoring throughout the clearance process to promote oversight and positive outcomes.[1] Our prior work has focused on the need for performance metrics measuring the timeliness and quality of investigations and adjudications, but quality is critical for every step of the clearance process.[2] The first step in the personnel security clearance process is position designation, which is the determination of whether an occupant of a federal position needs a security clearance. A sound requirements determination process is important in order to manage costs and investigative workloads, and equally important, in order to limit the access to classified information and reduce the associated risks to national security. In 2012 we reported that the Office of Personnel and Management (OPM) regularly conducts audits of its executive-branch customer agency personnel security programs, which include a review of position designation to assess the agencies' alignment with OPM position-designation guidance. In the audit reports we obtained as part of our 2012 review, OPM found examples of inconsistency between agency position designation and OPM guidance. For example, after the implementation of OPM's position-designation tool that was developed to guide agencies in determining proper position designation, OPM still found that it disagreed with 26 of the 39 designations reviewed in an April 2012 audit of a Department of Defense (DOD) agency.[3] Further, as I discussed in my written statement submitted to your subcommittee, the Office of the Director of National Intelligence (ODNI) found in a 2011 audit that the processes the executive-branch agencies followed for position designation differed somewhat depending on whether the position was civilian, military, or contractor.[4] These examples illustrate the utility in audits of the position designations made by agencies, which can provide important information about whether agencies are properly designating positions, which in turn can provide insight regarding the clarity and quality of position designation guidance or any tool used as part of that process.

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[1]See for example, GAO, *Personnel Security Clearances: Further Actions Needed to Improve the Process and Realize Efficiencies*, GAO-13-728T (Washington, D.C.: June 20, 2013).

[2]GAO, *DOD Personnel Clearances: Comprehensive Timeliness Reporting, Complete Clearance Documentation, and Quality Measures Are Needed to Further Improve the Clearance Process*, GAO-09-400 (Washington, D.C.: May 19, 2009).

[3]GAO, *Security Clearances: Agencies Need Clearly Defined Policy for Determining Civilian Position Requirements*, GAO-12-800 (Washington, D.C.: July 12, 2012).

[4]GAO, *Personnel Security Clearances: Actions Needed to Help Ensure Correct Designations of National Security Positions*, GAO-14-139T (Washington, D.C., Nov. 20, 2013).

2. You testified that the proposed rule "appears to add significant detail regarding the types of duties that would lead to a critical-sensitive designation." Do you agree that the lack of detail regarding *noncritical*-sensitive designations could result in an increase in those types of positions?

In our July 2012 report, we recommended that the Director of National Intelligence (DNI), in coordination with the Director of OPM and other executive branch agencies as appropriate, issue clearly defined policy and procedures for federal agencies to follow when determining whether a federal civilian position requires a security clearance.[5] ODNI concurred with our recommendation and agreed that executive-branch agencies require simplified and uniform policy guidance to assist in determining appropriate sensitivity designations. As part of our work to determine the status of the implementation of our recommendation, we found that in January 2013, the President authorized the DNI and OPM to jointly address revisions to the federal regulations that are intended to provide requirements and procedures for the designation of national security positions. We believe that the proposed regulation is a positive step toward meeting the intent of our recommendation. In reviewing the proposed regulation, we found that it would, if finalized in its current form, meet the intent of our recommendation to issue clearly defined policy and procedures to follow when determining whether federal civilian positions require a security clearance. Specifically, the proposed regulation appears to add significant detail regarding the types of duties that would lead to a critical-sensitive designation, or those national security positions that have the potential to cause exceptionally grave damage to national security. Regarding noncritical-sensitive designations, or the sensitivity level below critical-sensitive, the proposed regulation appears to include a definition of these types of positions that is similar to the definition that was previously provided in the position-designation tool, which is that noncritical-sensitive positions are national security positions that have the potential to cause significant or serious damage to national security, including but not limited to, (1) positions requiring eligibility for access to Secret, Confidential, or "L" classified information or (2) positions not requiring eligibility for access to classified information, but having the potential to cause significant or serious damage to national security. The proposed regulation does not appear to include a detailed list of the types of duties that would lead to a noncritical-sensitive designation, as it does for critical-sensitive. As the proposed regulation has yet to be implemented, it cannot be known whether these types of designations will increase, decrease, or remain the same. As the proposed regulation appears to include significant detail on the types of positions that are national security positions in general, as well as details about other sensitivity levels such as critical-sensitive, implementation may very well affect the designation of noncritical-sensitive positions. However, without audit work reviewing implementation of a finalized regulation, it is too soon to comment on the effect of these changes.

3. Given the steps that are being taken to address GAO's recommendations regarding the position designation process, what more is needed to improve quality in the position designation step of the personnel security clearance process?

A sound position-designation process requires clearly defined policies and procedures for federal agencies to follow when determining whether federal civilian positions require a security clearance, as well as periodic reassessment of position designations to ensure the designations remain accurate. In our July 2012 report, we recommended that the DNI, in coordination with Director of OPM and other executive branch agencies as appropriate, issue clearly defined

[5]GAO-12-800.

policy and procedures for federal agencies to follow when determining whether a federal civilian position requires a security clearance.[6] ODNI concurred with our recommendation and has moved forward with actions to address it. We found that in January 2013, the President authorized the DNI and OPM to jointly address revisions to the federal regulations that are intended to provide requirements and procedures for the designation of national security positions. We believe that the proposed regulation is a positive step toward meeting the intent of our recommendation. However, implementation guidance, including quality controls, still needs to be developed, and the proposed regulation recognizes that point. Further, we also recommended in that same report that the DNI, in coordination with the Director of OPM and other executive branch agencies as appropriate, issuance guidance to require executive branch agencies to periodically review and revise or validate the designation of all federal civilian positions. ODNI and OPM concurred with this recommendation. However, the proposed regulation does not appear to require a periodic reassessment, as we have recommended. We still believe that periodic review or validation of all federal civilian position designations should be required to help ensure that quality is built into this phase of the personnel security clearance process.

4. You have testified frequently about the impact of inconsistent position and clearance designation guidance on our national security. Do you believe there is worth in codifying the need for updated guidance, along with quality controls, and for periodic reviews of this guidance beyond the 24 month window in the proposed rule?

As I have testified on several occasions, a consistent and sound position designation process is the first step in ensuring an effective and high-quality personnel security clearance process.[7] As I recently stated before your subcommittee, we recommended in July 2012 that the DNI, in coordination with the Director of OPM and other executive branch agencies as appropriate, issue clearly defined policy and procedures for federal agencies to follow when determining whether a federal civilian position requires a security clearance and revise the position-designation tool to reflect that guidance.[8] As noted, ODNI concurred with our recommendation to issue clearly defined policy and procedures, and we see the proposed regulation issued jointly by ODNI and OPM as a positive step. It appears that the regulation, if finalized in its current form, would meet the intent of our recommendation to issue clearly defined policy and procedures to guide position designation. The proposed regulation has yet to be finalized, and we encourage ODNI and OPM to continue their efforts. Once the guidance is finalized, we continue to believe that the position-designation tool should be revised to reflect that guidance. Moreover, the proposed regulation notes that the DNI and OPM have responsibility for developing any needed implementation guidance, which may include policies, general procedures, criteria, standards, quality-control procedures, and supplementary guidance for the implementation of the proposed regulation. Further, we recommended in the July report that DNI, in coordination with the Director of OPM and other executive branch agencies as appropriate, issue guidance to require executive branch agencies to periodically review and

[6]GAO-12-800.

[7]GAO-14-139T; *Personnel Clearances: Key Factors to Consider in Efforts to Reform Security Clearance Processes*, GAO-08-352T (Washington, D.C.: Feb. 27, 2008); *Personnel Clearances: Key Factors for Reforming the Security Clearance Process*, GAO-08-776T (Washington, D.C.: May 22, 2008); and *Personnel Security Clearances: Preliminary Observations on Joint Reform Efforts to Improve the Governmentwide Clearance Eligibility Process*, GAO-08-1050T (Washington, D.C.: July 30, 2008).

[8]GAO-12-800.

revise or validate the designation of all federal civilian positions. As noted, the proposed regulation does not appear to require a periodic reassessment, in contrast to what we have recommended, aside from a onetime reassessment of position designations within 24 months of the final regulation's effective date, which is an important step towards ensuring that the current designations of national security positions are accurate. However, the national security environment and the duties and descriptions of positions may change over time, thus we still believe that periodic review or validation of all federal civilian position designations should be required. We plan to review the finalized federal regulation, any revisions to the position-designation tool, and any related guidance that directs position designation to determine whether periodic review or validation is required.

Post-Hearing Questions for the Record
Submitted to DAVID BORER
General Counsel
The American Federation of Government Employees

From Senator Jon Tester

"Safeguarding Our Nation's Secrets: Examining the National Security Workforce"
November 20, 2013

- Can you summarize the role currently played by the Merit Systems Protection Board?

If the decision of the Federal Circuit in *Kaplan v. Conyers* is allowed to stand, the role of the Board is likely to be entirely superficial when reviewing appeals arising from the denial or loss of a security clearance and when reviewing appeals arising from the denial or loss of eligibility to occupy a sensitive position that does not require a security clearance. For example, the U.S. Court of Appeals for the Federal Circuit has held that when reviewing the loss of a security clearance, the Board may only determine whether a security clearance was denied, whether the security clearance was a requirement of the appellant's position, and whether the procedures set forth in 5 U.S.C. § 7513, which are solely procedural, were followed. *Hesse v. Dep't of State*, relying on *Dep't of the Navy v. Egan.* The *Conyers* decision arguably extends this limitation on the Board's review to non-security clearance cases arising from loss of eligibility to occupy a sensitive position. The Federal Circuit has, moreover, held that the due process clause of the Fifth Amendment to the U.S. Constitution does not provide a federal employee with procedural rights in connection with a security clearance determination. *Garguilo v. Dep't of Homeland Security*. Consequently, under *Conyers*, the Board's role in security clearance-related appeals is likely to be little more than a rubber stamp for agencies - whose clearance and sensitivity determinations are not subject to enforceable oversight.

- How will taking the Board out of the equation impact federal employees?

Federal employees will suffer for the loss of meaningful review by the Board, as will the Merit System as a whole. The Board has successfully functioned, throughout its history, as a touchstone for employee due process rights. By eliminating the Board from the equation, employees will have no forum in which to obtain independent, meaningful review of agency actions arising from the denial or loss of eligibility to occupy a sensitive position or the denial or loss of a security clearance. Fundamental accountability considerations such as due process and fairness will be beyond the reach of any neutral reviewing body. For example, despite protestations to the contrary by ODNI and OPM, the 2013 proposed rule by ODNI and OPM for agency designation of sensitive positions does not contain any genuine oversight mechanism. It also lacks even a cursory discussion of the risk of over-designation of positions, which the 2010 proposed rule contained. The 2013 rule thus elevates form over substance by establishing a system whereby an agency may make any designation or clearance determination it wishes, no matter how arbitrary or improperly motivated, as long as the agency uses the correct key words. No one is checking the agency's homework – in part because designation determinations remain

unreviewable from the start. The loss of the Board as safeguard exacerbates this imbalance by depriving employees of neutral review at any point in the process.

- What protections should be put in place to ensure that the security clearance position designation process does not get overused and present a barrier to entry for candidates of diverse backgrounds, while still ensuring that the government protects access to classified information?

While there are numerous protections that might improve the position designation process, two stand out. First and foremost, *Conyers* should be overruled. Full merits review should be restored to the Board. Second, agency position designation determinations should be subject to ongoing and neutral civilian oversight. This oversight should be centralized and should include a mechanism for employees to challenge the designation status of a particular position. Employees are often in the best position to say what the actual duties of a position are and it is those duties that should guide the designation process, in conjunction other objective metrics which are also presently lacking. The problems of over-designation, under-designation, and undue barriers to entry would be addressed by establishing a centralized oversight system for federal civilian employees and providing those employees with a voice in the system.